Supreme Court, U.S.
FILED

(1) 96 56 JUL 1 1 1996

OFFICE OF THE CLERK
No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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74 pp

QUESTIONS PRESENTED

For over two decades, this Court has held that the National Environmental Policy Act ("NEPA") requires that every "significant impact" and "environmental consequence" of a federally funded project be given a "hard look" before a final decision is made. In this case, a three judge panel of the Sixth Circuit held that if a project's significant impacts are deemed "beneficial", i.e., the project improves an existing environmental problem, an environmental impact statement ("EIS") is per se unnecessary. In like fashion, the Panel applied the same test to the Michigan Environmental Protection Act ("MEPA"), holding that the Michigan prohibition against continued pollution from any project when a feasible, non-polluting alternative existed, was also not applicable where an existing environmental situation will be improved by the proposed project. The questions presented are:

1. Whether a court may rule, as a matter of law, that a project's significant impacts are all beneficial and therefore, no further NEPA evaluation is required, an issue in which the courts of appeals are in conflict?

2. Whether delaying evaluation of the costs and ability of a project to meet federal statutory requirements until after project completion is an improper segmentation of the NEPA analysis mandate?

3. Whether a Federal Court that has exercised sole jurisdiction over all area combined sewer overflow projects erroneously interprets state law, and thereby usurps state authority, by ruling that any new project which improves

existing environmental conditions, even though such project continues to pollute, is exempt from the Michigan Environmental Protection Act, which absolutely bars any project that pollutes the environment when a feasible nonpolluting alternative exists?

Actual parties to the proceedings in the Court of Appeals were:

Pure Waters, Inc. (an association of residents and property owners with no other corporate or parent company affiliations),
Petitioner herein,

Michigan Department of Natural Resources, Roland Harms, Director;
Oakland County Drain Commission, George W. Kuhn, Commissioner;
Chapter 20 Birmingham Sewer Overflow Drain Board, George W. Kuhn, Chairman;
City of Birmingham, Thomas M. Markus, City Manager,
Respondents herein.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE SIXTH CIRCUIT'S RULING ALTERS THIS COURT'S LONG ESTABLISHED PRECEDENTS IN APPLYING NEPA BY HOLDING THAT NO SIGNIFICANT IMPACT ANALYSIS IS REQUIRED WHERE THE ONLY PROPOSED PROJECT IMPACTS ARE DEEMED TO BE BENEFICIAL, BECAUSE THE PROJECT IS INTENDED TO IMPROVE EXISTING CONDITIONS, EVEN WHERE ADVERSE IMPACTS WILL REMAIN, A HOLDING IN CONFLICT WITH OTHER CIRCUITS 8

II. THE LOWER COURT IMPROPERLY ALLOWED DEFENDANTS TO SEGMENT THEIR NEPA ANALYSIS BY DEFERRING EVALUATION OF THE PROJECT'S ABILITY TO MEET FEDERAL STATUTORY WATER QUALITY REQUIREMENTS, AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY DECIDED BY THIS COURT 16

III. THE SIXTH CIRCUIT DECISION USURPS STATE LAW AUTHORITY BY EXEMPTING PROJECTS FROM MEPA REVIEW WHICH MERELY IMPROVE EXISTING CONDITIONS IN DIRECT CONTRAVENTION OF MICHIGAN LAW AND MICHIGAN SUPREME COURT DECISIONS THAT PROHIBIT CONTINUED POLLUTION WHEN A FEASIBLE NONPOLLUTING ALTERNATIVE EXISTS. 21

CONCLUSION 29

APPENDICES A1

A. *Pure Waters, Inc. v. Michigan Department of Natural Resources, et al.*, No. 95-1498 (6th Cir., April 15, 1996) *per curiam* opin. (unpublished) A2

B. *Pure Waters, Inc. v. Michigan Department of Natural Resources, et al.*, 883 F.Supp. 199 (E.D. Mich 1995) A11

C. Michigan Complied Laws, §§ 691-1201 through 691-1206 ..... A30

Table of Authorities

Page

Cases

Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975) 8

Attorney General v. Thomas Solvent Co., 146 Mich. App. 55, 380 N.W.2d. 53 (1985) 25

Baltimore Gas & Electric Company v. NRDC, 462 U.S. 87 (1983) 8

Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996) 9, 13

City of Portage v. Kalamazoo County Road Commission, 136 Mich. App. 276, 355 N.W.2d 913 (Mich. App. 1984) 24, 25

City of Rochester v. U.S. Postal Service, 541 F.2d 967 (2nd Cir., 1976) 18, 19

Charter Township of Huron, Mich. v. Richards, 997 F.2d 1168 (6th Cir. 1993) 8

Crounse Corp. v. I.C.C., 781 F.2d 1176 (6th Cir. 1986) 8

Dickman v. Santa Fe, 724 F.Supp. 1341 (D.N.M. 1989) 18, 19

Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th 1981) 9, 12

Eyde v. State of Michigan, 393 Mich. 453, 225 N.W.2d 1 (1975) 23, 26

Friends of Fiery Gizzard v. Farmers Home Administration, 61 F.3d 501 (6th Cir. 1995) 6

Michigan State Highway Commission v. Vanderkloot (also cited as *In Re Highway US24, in Bloomfield Township, Oakland City*), 392 Mich. 159, 220 N.W.2d 416 (1974) 23, 27, 28

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 8

Pure Waters, Inc. v. Michigan Dept. of Natural Resources, et. al., 883 F.Supp 199 (E.D. Mich 1995) 2

Ray v. Mason City Drain Commissioner, 393 Mich. 294, 224 N.W.2d 883 (1975) 1, 23, 24, 25

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 8, 19, 20

Sierra Club v. Lujan, 716 F.Supp. 1289, (D.Ariz. 1989) 18, 19

Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (1980), *cert denied*, 449 U.S. 1096 (1981) 18

U.S. v. South Florida Water Management District, 847 F.Supp 1567 (S.D. Fla 1992), *Aff'd in part, rev'd in part* and *remanded* on other grounds, 28 F.3d 1563 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1956, 131 L.Ed.2d 848 ..... 9, 13, 14

U.S. v. State of Michigan, 777 F.Supp. 1365 (E.D. Mich. 1991) 3, 22

Statutes and Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

28 U.S.C. § 2201-2202 3

33 U.S.C. § 1311(b)(1)(C) 17

33 U.S.C. § 1342(b) 22

42 U.S.C. § 4331 ..... 2, 3

MCL § 324.1701 2

MCL § 691.1201 2

MCL § 691.1202 3

MCL § 691.1203 ..... 3, 23

MCL § 691.1203(1) 28

MCL § 691.1205(2) 23, 28

40 C.F.R. § 1500.1(c) 13

40 C.F.R. § 1502.2(d) 16

40 C.F.R. § 1502.14 10

40 C.F.R. § 1502.14(a) 10

40 C.F.R. § 1508.27(b)(1) 14

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner is an incorporated organization of residents of the City of Birmingham, Michigan, including property owners adjacent to the Linden Park Sewage Retention Basin, a storm/sewer water collection basin being constructed in a City Park (Linden Park) and residential area. Petitioner seeks a Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit to review that Court's three judge panel decision (1) allowing defendants to segment evaluation of federal statutory requirements for attainment of water quality standards, and assessment of water quality impacts, until after project completion; (2) ruling that the project's only significant impacts are beneficial, and therefore, as a matter of law, required no further NEPA evaluation; and (3) the Panel's holding that the Michigan Environmental Protection Act, the state's primary environmental oversight statute[1], is inapplicable to projects which improve existing environmental conditions, even where the project will continue to pollute state waters compared to nonpolluting alternatives, in contradiction to language of the act which specifically prohibits such conduct.

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[1] The Michigan Supreme Court described the Michigan Environmental Protection Act as "world famous", noting that the Federal Clean Water Act as well as several other states have followed its example. *Ray v. Mason*, 393 Mich 294, 298, 224 N.W.2d 883, 887 (1975).

OPINIONS BELOW

The April 15, 1996 *per curiam* opinion of the three Judge Panel of the Sixth Circuit was not recommended for publication. It is reproduced in Appendix A to this petition. The April 21, 1995 opinion of the United States District Court for the Eastern District of Michigan is reported at 883 F.Supp. 199 (E.D. Mich 1995) and reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgement of the three Judge Panel of the Sixth Circuit was entered on April 15, 1996. No petition for rehearing *en banc* was requested because the 6th Circuit had unanimously rejected rehearing in an earlier case involving the same legal issue. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the application of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331, and the Michigan Environmental Protection Act ("MEPA"), Michigan Compiled Laws (MCL) § 691.1201. MEPA was recodified in 1995 and moved to MCL § 324.1701, et seq. No changes were made to the law that affect this case. Applicable MEPA statutes are cited herein under the former codification, the relevant references for this case. MEPA is reproduced in Appendix C.

STATEMENT OF THE CASE

This case involves the correction and treatment of "combined sewer overflows" ("CSO"), a pollution condition that exists when rainwater enters the same collection system used to convey human sewage and industrial wastes to a central treatment facility. When rainfall overloads these existing sewer lines, the combined rainwater, industrial wastes and sewage "overflows" at designated points to avoid sewage backup into homes and streets. CSOs are a national problem of major proportions; the Environmental Protection Agency ("EPA") has estimated that more than forty billion dollars may be needed to correct older system CSO problems.[2]

The jurisdiction of the district court concerning NEPA was invoked under 28 U.S.C. §1331, an action under federal law, 42 U.S.C. §4331, and the Declaratory Judgement Act, 28 U.S.C. § 2201-2202. Jurisdiction for MEPA claims results from the Court's pendent jurisdiction over state law issues concerning a common nucleus of operative fact. State jurisdiction exists under MCL § 691.1202 & 1203, which permits any person or corporation to sue the state and any political subdivision for the protection of air, water and other natural resources. In addition, the District Court for the Eastern District of Michigan has previously asserted continuing jurisdiction over all CSO programs in the Detroit area, on the basis that such programs were related to previous proceedings of the court. *U.S. v. State of Michigan*, 777 F.Supp. 1365 (E.D. Mich. 1991).

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[2] EPA 1992 Needs Survey and Report to Congress (September, 1993), estimates the national CSO correction cost at $41.2 billion.

The Rouge River System drains 467 square miles in Oakland, Wayne and Washtenaw Counties in southeastern Michigan. It is polluted by CSO discharges. Indeed, the entire Metropolitan Detroit area, to which the City of Birmingham's system is connected, has large areas of its waters closed or restricted to human contact as a result of CSO pollution. Billions of federal and state dollars have been spent in the Detroit area for sewer and CSO treatment, often with limited success, and doubtless billions more will be spent in the future.

The City of Birmingham proposed to correct its contribution to the area CSO problem by collecting and rerouting its sewer overflow points to a single sewer "retention" or holding basin, to be located in a public park and residential area, which would hold the combined wastewater until it could be accepted into the collection system for transport to central treatment facilities in Detroit. Federal grant funds would pay for the majority of the construction cost, estimated along with other system changes, to be about $35 million.

From the very beginning, the proposed project was conceded as inadequate to meet state or federal water quality requirements. This was because the retention basin size was too small to hold the combined volume of collected storm and sewer water, and thus it disgorges its sewage and industrial waste contents at least 6-9 times annually into the River. The resultant discharges of at least 43 million gallons of combined wastewater, with chlorine added as a disinfectant, would pour into the Rouge River, a stream about 5-6 feet wide and knee deep at the discharge point, as it winds through the back yards of residential homes.

The evidence that this partially treated discharge of sewage and industrial wastes will fail to meet water quality standards and will continue to pollute the Rouge River was overwhelming. The Environmental Assessment ("EA") prepared by the Michigan Dept. of Natural Resources conceded that further system upgrades, additional basins and/or partial sewer separation might be required to meet water quality standards. (R.86; EA P.21) Unrefuted expert testimony at trial indicated that this partially treated wastewater will contain a host of disease organisms from human waste, industrial toxins and added chlorine, a well known toxicant to aquatic life. (Jude TR I-127, 128, 132). The City's own engineer admitted that the partial treatment provided by the basin would remove only 30 to 60 percent of water pollutants. (Alix TR II-197).

Faced with such massive evidence of pollution potential, the trial court itself was forced to concede that pollution of the Rouge would continue and that water quality standards would be violated: "the necessity ...to discharge a limited amount of combined sewer overflow...will be polluting. I recognize that." (Court TR I-130) In response to counsel's argument that there will be water quality violations as a result, the Trial Court responded "Sure there is." (Court TR I-124, 125).

The proposed plan and EA, however, postponed all water quality impact evaluation until "Phase III" of the project, to be implemented *after* the project was built and in operation. By so doing, alternatives that would totally remove sewage and industrial waste that cause such water quality violations, i.e., sewer separation, were compared to a retention basin which contained no provision for meeting water quality

mandates, causing the other alternatives to appear either ridiculously expensive or too burdensome.[3]

As a consequence, when respondents issued their FONSI, it was based upon a project that the State knew was unlikely to meet water quality standards, contained no evaluation of water quality impacts (deferred until Phase III), and which would continue to pollute. Both the Trial Court and the Court of Appeals held, however, that the project's adverse water quality impacts were not significant *per se* under NEPA where the project impacts were "beneficial", i.e., they were designed to improve existing conditions.

The Sixth Circuit panel did not address the lack of water quality evaluation, nor the deferral or segmentation of consideration of water quality impacts until after project completion, or the failure to assess the costs and additional structures necessary to meet state water quality standards. Rather, the 6th Circuit never even considered water quality impacts, focusing instead on another recent Sixth Circuit Panel decision holding that an environmental impact statement is not required where the project is deemed to be beneficial and therefore, all significant impacts are deemed to be beneficial. *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995). "When viewed

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[3] Both the Trial Court and the Court of Appeals focused on the most expensive of three separation options, pointing to the great disruption of streets and high costs. The record reveals, however, that far less disruptive and less costly separation alternatives were available that would have eliminated discharges of combined wastes to the Rouge River.

under that standard..." the Sixth Circuit Panel upheld the FONSI. App. A.

In so doing, the court constrains all NEPA analysis to a preliminary finding of project purpose, regardless of the range of consequences for any given action, effectively negating meaningful analysis of any project perceived to "improve environmental conditions."

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S RULING ALTERS THIS COURT'S LONG ESTABLISHED PRECEDENTS IN APPLYING NEPA BY HOLDING THAT NO SIGNIFICANT IMPACT ANALYSIS IS REQUIRED WHERE THE ONLY PROPOSED PROJECT IMPACTS ARE DEEMED TO BE BENEFICIAL, BECAUSE THE PROJECT IS INTENDED TO IMPROVE EXISTING CONDITIONS, EVEN THOUGH ADVERSE IMPACTS WILL REMAIN, A HOLDING IN CONFLICT WITH OTHER CIRCUITS.

For over two decades this Court has repeatedly held that NEPA imposes a mandatory duty to evaluate "every significant impact" of a proposed action, *Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983), while providing data and information that serves as a "spring board for public comment", *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The "sweeping policy goals" of section 101 of NEPA are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." *Charter Township of Huron, Mich. v. Richards*, 997 F.2d 1168, 1173 (6th Cir. 1993), citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Indeed, the cases from this Court and the general federal judiciary on this point are well recognized. *See also, Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975); and in the Sixth Circuit, *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (6th Cir 1986).

Now two recent cases from the Sixth Circuit seek to eliminate NEPA scrutiny of projects where the court perceives that the "only significant impacts are beneficial" and even further extends such logic to those projects where the "principal impact" is beneficial as well. These holdings undermine the very purpose of NEPA analysis, and are contrary to NEPA regulations and the rulings of at least three other circuits. *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir 1981); *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1437 (10th Cir 1996); *U.S. v. South Florida Water Management District*, 847 F. Supp 1567 (S.D. Fla 1992), *Aff'd in part, rev'd in part* and *remanded* on other grounds, 28 F.3d 1563 (11th Cir. 1994), *cert. denied* ___ US ___, 115 S. Ct. 1956, 131 L. Ed. 2d 848.

In rejecting NEPA's "hard look" mandate for projects where significant impacts are perceived to be beneficial, the Court improperly, and prematurely, relieves the decision-maker of a meaningful analysis of environmental impacts or alternatives. In the case at bar, where the City of Birmingham is proposing to address its CSO problem and eliminate multiple untreated overflow points by combining them all into one partially treated overflow, the Court excuses the need for meaningful evaluation of discharge impacts, or the analysis of equivalent alternatives, simply because the project's overall impact is deemed "beneficial." In so holding, the Court declares that the remaining water quality violations and pollution are per se not significant environmental impacts and therefore not subject to NEPA evaluation.

The Sixth Circuit's cursory conclusion that the FONSI decision was reasonable in light of additional problems

associated with sewer separation alternatives underscores the point: sewer separation alternatives which eliminated sewage and industrial wastes altogether were compared to the costs and problems associated with a retention basin which would not meet such requirements and would continue to violate water quality standards. Based upon such a biased comparison, of course the retention basin proposal looks good. This stilted comparison, however, violates the "heart of the EIS" evaluation, which "should present the environmental impacts of the proposal and the alternatives in comparative form." 40 C.F.R. § 1502.14. CEQ regulations require agencies to "rigorously explore and objectively evaluate all reasonable alternatives...." 40 CFR § 1502.14(a). Petitioner and the final decision maker were denied the basic NEPA analysis the law requires.

This case has tremendous implications for the expenditure of scarce federal and state water pollution funds. Although improvement of existing pollution conditions is always a worthy objective, federal law and common sense demand that such funds be spent not only in the most effective manner, but also in a manner that will also meet the minimum requirements of federal law -here, achievement of state and federal water quality standards. Without this underpinning, public funds simply promote more local "pork" projects that provide only temporary solutions, eventually result in greater

costs overall, and, even worse, little improvement in conditions.[4]

The NEPA interpretation offered by the Sixth Circuit fosters and promotes this very evil, by denying the application of NEPA's strict requirement that every decision be "an informed" decision. At a time when billions of federal dollars are at stake, the Sixth Circuit would virtually rule every combined sewer overflow correction project exempt from NEPA analysis because its primary impact is deemed beneficial. In Michigan alone, dozens of such projects are in various stages of proposal or construction, and not one has

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[4] This is exactly what is happening with CSO projects in the Detroit metropolitan area. Almost on the day that the Sixth Circuit issued its opinion in this case, the Detroit papers ran a lead story describing the incredible cost overruns, construction problems and water quality impacts of the retention basin construction throughout the area. "Sewage project a drain downriver", David Sheparson, The Detroit News, Section C, pg.1. The lead sentence reads: "A court-ordered plan to prevent the discharge of raw sewage into the Detroit River has skyrocketed in cost and might have to be scrapped." Increased costs were attributed to tunnel construction, soil conditions, tunnel volume increase and added capacity to basins. The Twelve Towns retention basin, the largest CSO facility in the area, has caused such severe water quality problems that its receiving waters, Lake St. Clair, a large lake that forms an international border between the U.S. and Canada, has been closed to human contact recreation. NEPA issues for *every one* of these area wide CSO projects was decided by FONSI.

been subject to an environmental impact analysis for water quality attainment.[5]

The Sixth Circuit view is in direct conflict with courts in at least three other Circuits. The seminal case on this issue was decided by the Fifth Circuit in 1981. In *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th 1981), the Court stated:

> The proper question is not the intent behind the actions, but the significance of new environmental impacts...even if the...new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones. (Citations omitted).

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[5] Full and proper consideration of water quality impacts would have included (1) the continuing costs and impacts of processing rain water at the central wastewater treatment facility; (2) cost and impacts of feeder pipe construction from the project site to Detroit; (3) the costs and impacts of additional basin capacity to eventually eliminate overflows and meet state water quality standards; (4) costs of cleanup and impacts of continued water pollution until such time as water quality standards are achieved; and (5) costs of eventual separation of sewers from continued tree root damage, deterioration and age of existing lines. None of these impacts were evaluated for this project; and only some water quality impacts will be evaluated after the project is finished.

The Tenth Circuit recently issued an especially strong opinion on this subject:

> To interpret NEPA as merely requiring an assessment of detrimental impacts upon the environment would significantly diminish the act's fundamental purpose—to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." Citing to 40 C.F.R. 1500.1(c), Council on Environmental Quality ("CEQ") Regulations.

Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429,1437 (10th Cir. 1996).

The Tenth Circuit then stated, as if anticipating this situation, that:

> Appellant's theory [beneficial impacts not subject to EIS] would cast the judiciary as final arbiter of what federal actions protect or enhance the environment, a role for which the courts are not suited.

Catron County, 75 F.3d at 1437.

Finally, the District Court of the Southern District of Florida in the Eleventh Circuit reached the same conclusion, noting that measures intended to benefit the environment "do not necessarily render them beyond the scope of NEPA's requirements." *U.S. v. South Florida Water Management*

District, 847 F.Supp. 1567, 1578 (S.D. Fla 1992), *Aff'd in part, rev'd in part* and *remanded* on other grounds, 28 F.3d 1563 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1956, 131 L.Ed.2d 848.

Further, the CEQ Regulations regarding NEPA do not support the Sixth Circuit. CEQ regulations for significant impacts include those impacts which are *both* beneficial and adverse:

> Significantly as used in NEPA requires consideration of context and intensity: (b) Intensity...The following should be considered in evaluating intensity: (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. 40 C.F.R. § 1508.27(b)(1).

As noted in *South Florida Water Management District* at 1578, "even the most well-intentioned environmental project can have unintended negative effects."

The Circuits are now divided on a fundamental interpretive issue of NEPA: whether NEPA analysis can be avoided for projects whose principal impact is beneficial or otherwise designed to improve existing environmental conditions, or whether such projects, even if beneficial in purpose, must still be evaluated where significant impacts are shown. On the facts of this case, where the beneficial impacts of a partial sewer overflow correction were deemed sufficient to negate analysis of the adverse remaining water quality impacts, including continuing pollution and further

violations of water quality standards and, further, sufficient to negate NEPA analysis of alternatives that would eliminate such impacts, this Court is squarely presented with the necessary factual setting to resolve the existing conflict among the circuits.

II. THE LOWER COURT IMPROPERLY ALLOWED DEFENDANTS TO SEGMENT THEIR NEPA ANALYSIS BY DEFERRING EVALUATION OF THE PROJECT'S ABILITY TO MEET FEDERAL STATUTORY WATER QUALITY REQUIREMENTS, AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY DECIDED BY THIS COURT.

CEQ Regulations speak directly to the issue of compliance with other environmental laws:

> Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act *and other environmental laws and policies* (emphasis added).

40 C.F.R. §1502.2(d).

In a project whose sole purpose was to enable the Rouge River to meet Federal water quality requirements, the Court allowed the deferment of any evaluation of whether, or how, the project could meet those requirements until after the project was constructed. Although the NEPA holding of the 6th Circuit was based upon the conclusion that the "only significant impacts of the project were beneficial" (App. A), both courts below recognized that the resultant sewage retention basin discharges would clearly include the discharge of human sewage, industrial waste, toxic levels of chlorine and other contaminants which would continue to cause water

quality violations and pollution because the basin provided only partial treatment for wastewater discharges.[6] Nevertheless, both Courts refused to require defendants to evaluate either the project's ability or its cost to meet water quality standards.

From the beginning, Petitioner asserted that any fair comparison of alternatives must include the costs of water quality compliance, particularly when other alternatives would eliminate sewage and industrial waste discharges, while the retention basin involved continued discharge of such wastes and a need for further treatment. Petitioner also reminded the Court that compliance with water quality standards was an absolute mandate of federal law, thus a binding condition on any adopted alternative. *See*, Clean Water Act, 33 U.S.C. § 1311(b)(1)(C).

Yet defendants performed no such analysis, refusing to assess (1) the existing water quality of the Rouge River at the proposed discharge point; (2) the ability of the stream to accept the anticipated wastewater discharges; or (3) the final treatment requirements necessary to meet water quality standards. This despite unrefuted expert testimony that the retention basin could not, as designed, meet water quality standards.

Rather, defendants asserted that water quality compliance would be part of "Phase III" of the project, an

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[6] The statements of the trial court, *supra*, are self-evident. The Sixth Circuit opinion acknowledges later, third stage construction of additional controls, if necessary, to comply with water quality standards. App. A.

evaluation of retention basin performance after it was constructed and placed into operation. While any project's success or failure can be evaluated after it is placed into operation, as it should be, the deferred evaluation of any major project component during the decision process eliminates a critical part of the alternatives analysis required by NEPA. Sewer separation alternatives might have different costs, or present different problems in their implementation compared to a retention basin, but separation *eliminates* the discharge of such wastes. Such an option is not fairly compared to an alternative that continues such discharges without analysis of the costs and facilities necessary to meet federal requirements for water quality.

Furthermore, the very concept that this project has "only" beneficial impacts derives from the failure of the court to consider the adverse impacts of 43 million gallons of partially treated sewage dumped into a stream only a few feet wide and inches deep.

The lower Federal courts have addressed the concept of "segmentation" of NEPA analysis, *Dickman v. Santa Fe*, 724 F. Supp 1341 (D.N.M. 1989); *Sierra Club v. Lujan*, 716 F. Supp 1289 (D. Ariz. 1989); *City of Rochester v. U.S. Postal Service*, 541 F.2d 967 (2nd Cir., 1976); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F. 2d 231 (3rd Cir., 1980), *cert. denied*, 449 U.S. 1096 (1981). In the previous cases, however, such segmentation has involved

the separation of a large scale project into several parts, such as dividing a highway project into several "segments."[7] Although never decided by this court, such segmentation has been consistently struck down:

> The rule against segmentation was developed to insure that interrelated projects, the overall effect of which may be environmentally significant, not be artificially divided into smaller, less significant actions. Cites omitted. *Dickman* at 1345.

One of the principal concerns for such segmentation was the potential to "foreclose the opportunity to consider alternatives." *Id.* After-the-fact analysis does not substitute for timely NEPA evaluation. "*[P]ost hoc* compliance with NEPA is unlawful." *Sierra Club v. Lujan*, 716 F.Supp. at 1293, citing *Robertson v. Methow Valley Citizens Council*. "To permit noncomprehensive consideration of a project...would provide a clear loophole to NEPA." *City of Rochester*, 541 F.2d at 972.

Here, defendants have segmented compliance with the project's very purpose, i.e., the attainment of water quality standards, into an after-the-fact project "phase", a blatant

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[7] Until this case, no court has allowed segmentation of parts of a single project as discrete and self-contained as the location and construction of a single, individual sewage retention basin. In the one case addressing segmentation, this court ruled that there was no obligation to prepare as impact statement as to regional effects where no regional action was proposed. *Kleppe v. Sierra Club*, 427 U.S. 390, 399-402 (1976).

attempt to avoid accountability for a federal requirement defendants simply chose to ignore. The result is a project decision utilizing federal money that makes no attempt to comply with or consider federal law.

The segmentation of existing federal or state requirements which are applicable to the given project defeats NEPA's alternative analysis purpose, if not the entire NEPA mandate. It is not the "hard look" required by NEPA, nor does it disclose the relevant information required for the public role in the decision process. *Robertson*, 490 U.S. at 349. Moreover, the failure to account for existing requirements of law exposes the project to future unexpected high costs or even failure of original purpose. The analysis required by NEPA, both in cost and technical assessment, is designed to force acceptance of the consequences of meeting legal requirements as well as the particular purposes of the project. The failure to consider meeting water quality requirements as a significant impact requiring review is a repudiation of the requirement to define the issues and provide a clear basis for choice among options by the decisionmaker and the public. This is particularly agregious where the very purpose is to eliminate water quality violations.

Therefore, Petitioner asks this court to make clear that the requirements of law, just as project construction components, cannot be segmented and thus avoid NEPA analysis.

III. THE SIXTH CIRCUIT DECISION USURPS STATE LAW AUTHORITY BY EXEMPTING PROJECTS FROM MEPA REVIEW WHICH MERELY IMPROVE EXISTING CONDITIONS IN DIRECT CONTRAVENTION OF MICHIGAN LAW AND MICHIGAN SUPREME COURT DECISIONS THAT PROHIBIT CONTINUED POLLUTION WHEN A FEASIBLE NONPOLLUTING ALTERNATIVE EXISTS.

Petitioner recognizes that this Court infrequently grants review of federal court interpretations of state law since such decisions are not binding upon state courts and often do not decide issues of national importance. The decision of the Sixth Circuit in this case, however, should be reviewed because (1) the federal district court has taken jurisdiction over all cases affecting the Detroit area CSO program, thereby denying any state court review of any aspect of the CSO program under any condition; and (2) the Sixth Circuit has applied its beneficial impact test for NEPA to a state law which contains no such provision, and which, in fact, specifically prohibits any project which will continue to pollute the state's natural resources when *another alternative is feasible*. In short, the Sixth Circuit has imposed its federal view of environmental regulation to weaken established Michigan law, creating disparity and injustice between state and federally regulated projects and denying the state its proper role in pollution abatement.

The Federal District Court has been an active player in the effort to control Detroit area CSOs, and has indicated that it will continue to exercise jurisdiction over any issues

arising under or impacting the CSO correction program, notwithstanding any other state authority. *U.S. v. State of Michigan*, 777 F.Supp. 1365. Thus, all CSO questions regarding NEPA, either permits, enforcement and related issues must be filed in federal court, or they will be removed to federal court by defendants to avoid the application of more stringent state law.[8]

The practical effect of this decision has been to deny any review of state law by the state court and to place the entire area CSO abatement program under sole federal supervision and control, without any finding that state law is inadequate or unqualified to address these issues, and despite the fact that Michigan has been "delegated" permitting and water quality program implementation under the Clean Water Act by the Environmental Protection Agency. *See*, e.g, 33 U.S.C. § 1342(b).

Another effect of the court's ruling is to eliminate application of MEPA's stringent pollution prohibition and its provision for agency accountability with respect to selection or authorization of alternatives. Under these conditions, sweeping determinations with respect to state law, as here, have great practical reach. They fundamentally alter the state's CSO abatement program without the state ever being able to interpret and apply its own laws, while stripping

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[8] The first action by Petitioners in this case was to seek a temporary restraining order under state law (MEPA) in Michigan state court. That action was promptly removed to the federal district court by defendant City of Birmingham. Petitioners later non-suited its TRO request and filed the present action under NEPA and MEPA in the federal court.

the State's citizens of their statutory right to seek review of agency actions under the strict MEPA standard.

In addition to exercising its own federal control over CSO projects, the District Court decision, with concurrence by the Sixth Circuit, has now eliminated the application of MEPA altogether to CSO programs by declaring that MEPA does not apply to projects which improve the environment, a holding for which there is no precedent and in direct conflict with the application of MEPA by the Michigan Supreme Court in other cases in which the disputed project would have improved existing conditions. *Ray v. Mason City Drain Commissioner*, 393 Mich 294, 224 N.W. 2d 883 (1975); *Eyde v. State of Michigan*, 393 Mich 453, 225 N.W. 2d 1 (1975); *Michigan State Highway Commission v. Vanderkloot*, 392 Mich 159, 220 N.W. 2d 416 (1974).

MEPA is a very direct state law. It states in clear terms that whenever a plaintiff makes a prima facie showing of pollution, impairment or destruction of the state's natural resources, plaintiff is entitled, as a matter of law and without court discretion, to injunctive relief prohibiting such project. Moreover, the statute specifically precludes an agency from approving any action that pollutes, impairs or destroys the State's natural resources unless no feasible and prudent alternative exists. MCL § 691.1203, 1205(2). *Ray v. Mason*, 393 Mich. at 306, 224 N.W.2d at 889.

The Court's ruling that no impairment can exist, and therefore, no prima facie case can be made, if the project improves existing conditions effectively nullifies this fundamental provision of Michigan law. Under MEPA, plaintiffs need only show *probable* pollution to make a prima

facie case; the burden then shifts to defendants to show that no alternative exists. *Ray v. Mason* at 393 Mich. at 309, 224 N.W.2d at 889. In the case now before the court, the District Court conceded that pollution would occur and that water quality standards would be violated. The state admitted in the EA that the discharges of chlorine alone could cause toxic effects and that predicted levels of discharge could kill aquatic life. Adverse testimony by the state manager in charge of the project testified at trial that the sewer separation options offered by Petitioner were feasible alternatives and, in fact, have been approved in other communities (Kamppinen, TR II-64).

Thus, without question, Petitioner met its burden of showing that pollution would result from the proposed project and that feasible alternatives existed. The District Court avoided the otherwise mandated finding for Petitioners by asserting that MEPA did not apply. Ignoring the Statute's prohibition of "pollution" of natural resources, and focusing only on the term "impairment" (a term most commonly applied in MEPA cases when a "renewable" resource, i.e., trees, is involved), the District Court ruled that "impairment" meant to "weaken or make worse", and since the project purpose was to improve existing conditions, MEPA did not apply, as there was no "impairment" to warrant state court jurisdiction, citing *City of Portage v. Kalamazoo County Road Commission*, 136 Mich. App. 276, 355 N.W.2d 913 (Mich. App. 1984).

Both the District Court and the Sixth Circuit focused on one statement in *City of Portage* that, as an initial "threshold" of jurisdiction, "the court should evaluate the situation prior to the proposed action and compare it with

the probable condition afterwards." *Id.* at 915. However, as the Michigan Court made clear one page later in the opinion, that evaluation was only for the purpose of making an initial determination of pollution, impairment or destruction; and even that evaluation must use the *unpolluted* condition as the "situation prior." *Attorney General v. Thomas Solvent Co.*, 146 Mich. App. 55, 64, 380 N.W.2d. 53, 58 (1985). Where the project would cause pollution, as was shown repeatedly at trial, MEPA "does not contemplate or permit a determination that a prima facie case has been made by the balancing of disadvantages against advantages of the defendant's proposed action." *City of Portage,* 355 N.W.2d at 916. Yet, that is exactly what both courts did.

The Michigan Supreme Court has made clear that beneficial purpose and impact does not negate MEPA's pollution impairment prohibition or the requirement that such impacts be evaluated. In *Ray v. Mason, supra,* where the state high court enjoined a "beneficial" drainage project, plaintiff's allegation was that the lowering of the water table might be harmful to aquatic plants dependent on established water levels. *Ray v Mason*, 224 N.W.2d at 890, n.11. Defendants asserted that the wetlands would not dry up, and that the completed project might enhance wildlife, benefit agricultural output and *lessen rather increase the degrading effects of flows on lower river waters. Id.*, 224 N.W.2d at 891, n.12. The Court explained that the evidence required for defendants to show that there is no pollution or impairment will vary with the type of pollution. In some cases it may be sufficient to use expert testimony, while in others field studies, actual tests and analysis may be required. *Id.*, 224 N.W.2d at 890-891. If defendants attempt to rebut a prima facie case by showing that no feasible alternative exists, the Judge must

set out those facts that lead to such a conclusion. *Id.*, 891. The Michigan Supreme Court never stated, implied or accepted in any way that defendant's claim that the project would improve environmental conditions precluded a prima facie case and rendered MEPA inapplicable.

In another situation very similar to the case at bar, the State high court enjoined a sewer line construction project (a "beneficial project") until pollution, impairment and destruction of plaintiff's property could be avoided *by development of an alternative route*. *Eyde v. State of Michigan*, 393 Mich. 453, 225 N.W.2d 1 (1975). Rejecting the lower court's finding that the plaintiff's claim was nothing more than a dilatory delaying tactic, the State Supreme Court found that the right of citizens to prevent pollution and insist on viable alternatives was fundamental to MEPA. Again, the beneficial impact of constructing public sewer lines, just like this retention basin, is obvious. But that did not preclude making a prima facie case or alter the fact that significant adverse impacts may also occur, and under Michigan law, that feasible nonpolluting alternatives must be elected.

In one of the earliest decisions on MEPA, the Michigan Supreme Court described MEPA as:

> [A] comprehensive effort...[by] the legislature to preserve, protect and enhance the natural resources so vital to the well being of this state...This language does not confine itself to any one narrow area, but *applies to any action* on the part of any public agency... which has harmed the environment or is likely to do so...*including* planning and construction of the

> State's highway system and a *myriad of other public...activities* (emphasis added).

Michigan State Highway Commission v. Vanderkloot, 392 Mich 159, 186, 220 N.W.2d 416, 427 (1974).

With respect to projects involving an "improvement" of conditions, the court was very specific:

> Referring...to our prior observations relative to the exercise of a proper discretion in the choice of alternatives in accomplishing the "improvement" purpose...it is clear that, since the environmental constitutional provision and [M]EPA, there are new considerations in the proper exercise of Commission discretion in the choice of alternatives.[9] *Id.*, 220 N.W.2d at 428.

The court then held that even in the taking of a piece of property for a highway easement, the agency must take into consideration that "there is no feasible and prudent alternative" if the taking involves pollution, impairment or destruction. *Id.* It is ironic indeed to note that the court

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[9] The Michigan Supreme Court has held that the State Constitution mandates legislation to protect Michigan natural resources, which are of "*paramount public concern*" (emphasis courts'). *Vanderkloot*, 220 N.W.2d at 426. MEPA is just such a legislative enactment in response to that mandate, and "must be read in concert" with other states statutes. *Id.* at 427. By executive order, all agencies are bound to observe MEPA provisions. *Id.* at 429; Michigan Executive Directive 1971-10.

stated in dicta that the burden for pollution analysis for the highway department should not be overbearing, as the NEPA required a rigorous environmental analysis of federally funded projects. *Id.*, 220 N.W.2d at 429. Here, Petitioner got neither.

MEPA is an extremely important State environmental statute, enacted under a State constitutional mandate, which has provided a level of environmental protection to Michigan citizens since 1970 that plainly exceeds that provided by applicable federal law. In an appalling over overreaching decision by a court which has assumed sole jurisdiction over all area CSO projects, and relying upon out-of-context language from a state appellate court opinion, in an issue of first impression, the Federal Court has rendered MEPA inapplicable to the very injuries the law was created to address. Substituting its own "incremental" approach to pollution abatement, the Federal Court has placed its view of environmental protection above that of more stringent state law. The Court showed no deference to state law, and ignored the constitutional separation of powers between federal and state laws.

MEPA differs fundamentally from federal law in mandating that no project shall be undertaken that is "likely to" pollute, impair or destroy state natural resources. MCL § 691.1203(1). In protecting its natural resources, state law demands that any project alternative which does not pollute state natural resources *must be chosen*. MCL § 691.1205(2). By ignoring the state mandate, and twisting state law to justify a polluting project under theories soundly rejected by previous state law, the Federal courts have usurped state authority, and imposed their view of environmental control over the

entire regional CSO program. At a particularly crucial juncture in the history of this nation, where deference to state laws and state's rights are being intensely reviewed, and the cost of environmental programs equally scrutinized, the actions of the Federal court with respect to state law are not only legally wrong, but fundamentally flawed and should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,
et al.,

Respondents.

APPENDICES

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APPENDIX A
NOT RECOMMENDED FOR PUBLICATION

No. 95-1498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PURE WATERS, INC.

Plaintiff-Appellant

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES et. al.

Defendants-Appellees

BEFORE: BOGGS and DAUGHTREY, Circuit Judges, and MATIA, District Judge.[1]

PER CURIAM. The plaintiff, Pure Waters, Inc. is a citizen's group comprised largely of people residing near Linden Park in Birmingham, Michigan. Pure Waters appeals the district court's refusal to enjoin construction of an underground sewage retention treatment basin in the park. It

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[1] The Honorable Paul. R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

claims that the defendants, the Michigan Department of Natural Resources, the Oakland County Drain Commission, The City of Birmingham, and various other officials, violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332 et seq., by failing to evaluate adequately the basin's ultimate effect on the water quality of the Rouge River, into which it is designed to drain and, further, that the defendants violated the Michigan Environmental Protection Act (MEPA), M.C.L. §§ 691.1201 et seq., by instituting a project that will "pollute, impair or destroy" the environment. The district court held that the Michigan Department of Natural Resources had complied with the procedural mandates of NEPA and that the plaintiff had failed to establish a prima facie case of "impairment" under MEPA. The court therefore declined to issue an injunction. We find no error and affirm.

FACTUAL BACKGROUND

This case had its origins in an action filed by the Environmental Protection Agency in 1977 under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., against the city of Detroit and some 40-odd other communities in the Rouge River watershed in Eastern Michigan. At that time (and possibly to date), the Rouge River was one of the most polluted rivers in America, and the project at issue here, among others, was designed to clean up the Rouge. In the case of defendant City of Birmingham, the challenge was to ameliorate the discharge of untreated sewage and storm water into the river at 33 outflow points on "wet days," when the city's combined sewage and storm system could not handle the volume produced by heavy rains.

In 1989, the Michigan Water Resources Commission issued a "national pollution discharge elimination system permit" to the City of Birmingham that required the control of its combined sewer overflows by 1997. The permit established three phases for the eradication of the damage to the Rouge River caused by untreated sewage. In the first stage, the city would operate, repair, and maintain existing facilities to minimize the discharge. In the second stage, the city would control sewer overflows to eliminate discharge of raw sewage and protect the public health by 2005. Finally, in a third stage, the city would add additional controls, if necessary, to comply with water quality standards at times of discharge into the river.

The Linden Park underground basin was designed to hold excess sewage during heavy rains until the sewer system again has the capacity to carry it to the Detroit sewage plant, as occurs on normal or "dry days." However, during extremely heavy rains, estimated to occur six to nine a year, even the new retention basin would not be able to hold all the sewage. Therefore, after "primary" treatment, which includes skimming, settling, and disinfection with sodium hypochlorite (a five percent chlorine solution), the excess sewage would be released into the river at Linden Park, rather than at the 33 outflow points presently used. The project would reduce overall discharge into the Rouge River from 222 million gallons annually to 43 million gallons, and that overflow would be treated before it was discharged.

When challenges to the remedial plan developed, Judge Feikens took jurisdiction over all permit questions at the request of three of the Rouge River watershed communities, including Birmingham. He appointed Jonathan

Buckley, a University of Michigan professor, as court monitor to negotiate a settlement as the administrative hearings progressed before the Michigan Water Resources Commission. In June 1991, a settlement agreement included revision of the original 1989 permit.

In 1992, the defendants sought federal and state loans for the basin project and received engineering proposals. The Birmingham City Commission appointed a citizens' committee to hold public hearings on the proposed basin. After considering the project's impact, as well as the impact and cost of alternatives, the citizen's committee recommended construction of the basin. After the Michigan Department of Natural Resources notified the city in 1993 that the basin met the permit's requirements, the City Commission approved the plan. In 1994, the Department completed an environmental assessment, concluding that the basin would have no significant long-term impact on water quality, and that the environmental benefits of the basin outweighed the short-term adverse effects. Bonds were issued by the city to finance the project and construction began in December 1994.

At about the same time, Pure Waters filed an amended complaint in district court, seeking to block construction of the Linden Park retention basin. The district court denied requests by Pure Waters for both a temporary restraining order and a preliminary injunction, which the district judge treated as a motion for a permanent injunction.[2] On appeal, Pure

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[2] The district court also denied the plaintiff's motion for a stay pending this appeal of the denial of an injunction. As a result, we are informed that construction of the basin is now substantially more than 50 percent complete.

Waters complains that the defendant's environmental assessment and "finding of no significant impact," the so-called FONSI, fail to meet the requirements of both NEPA and MEPA, as well as the water quality standards of the Clean Water Act.

Initially, the plaintiff challenges the defendant's failure to file an environmental impact statement evaluating the quality of the water that would result from the six-to-nine discharges of treated sewage into the Rouge River each year, which would occur despite the construction of the basin. Experts for Pure Waters testified, for example, that the chlorine from the disinfection treatment given the overflow would adversely affect water quality. The plaintiff further insists that the defendants' plan to install the equipment necessary to deal with such problems during the monitoring period required in Phase III of the project is inadequate, citing district court decisions from New Mexico, New Hampshire, and New York.

But, as the district judge noted in his opinion, the plaintiff's real complaint seems to be that the city commission failed to adopt what Pure Waters sees as the better alternative to the Linden Park basin project—one which, the plaintiff insists, would have no adverse effects on water quality because it would eliminate entirely the discharge of sewage, treated and untreated, into the Rouge River. Under this plan, the city would be required to abandon its combined sewer-storm water system and to build a new, separated system, based on one of three designs: (1) construction of storm sewers with utilization of existing sanitary sewers, (2) construction of new sanitary sewers with footing drain removal, or (3) construction of sanitary sewers without the

footings. The cost of these alternative systems was estimated at amounts up to the twice the cost of the basin project, which was pegged at approximately $30 million. Although Pure Waters' actual preference, the third option, would cost only 50 percent more than the basin project (some $45 million), it would require two to three years of construction during which 80 percent of the city's streets would be torn up, the securing of a great many easements to permit the necessary encroachment of construction on private property, the loss of hundreds of trees along the right-of-way, and the construction of a basin almost as large as the one currently under construction.[3] Because of the additional cost and other negative effects that constructing a new sewer system would entail, this alternative was rejected by city officials in favor of the retention basin plan.

In a thorough and well-reasoned opinion, the district judge refused to enjoin construction of the basin on the basis of federal law. The court found the public interest in the basin to be substantial, given the public health risk caused by the level of raw sewage pollution then being discharged into the Rouge River; the possible waste of the $1.5 million already spent on basin construction at the time of the hearing on the motion to enjoin; the extensive citizen participation in the basin decision; and the considerable research and planning

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[3] The plaintiff's alternative of choice would require a basin capacity of 4.5 million gallons, as compared to the 5.5 million gallon basin currently under construction. The plaintiff does point out on appeal that a tunnel already constructed would hold the necessary 4.5 million gallon overflow that its alternative would require. Even so, the cost of the proposed alternative would not be reduced because of the tunnel's existence.

effort undertaken in designing the project, the strength of the environmental assessment, and the existence of the FONSI—the "finding of no significant impact." The court concluded that the defendants had not violated NEPA because their environmental assessment met the requirements of 42 U.S.C. § 4332(c), they had held public hearings, and they had issued a FONSI.

NEPA requires every federal agency to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ...the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(c)(I). Agencies first prepare an "environmental assessment" in order to determine whether the project's effect on the environment will be significant enough to warrant a more detailed "environmental impact statement." 40 C.F.R. § 1501.4(b)-(c)(1995). If the agency decides that an environmental impact statement is necessary, then it must prepare a "finding if no significant impact." 40 C.F.R. § 1501.4(e). Courts will overturn an agency decision not to issue an environmental impact statement only if it is found to be arbitrary, capricious, or an abuse of discretion. *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986). Hence, NEPA is simply an "action-forcing" provision designed to ensure that agencies consider the environmental impact of their decisions. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976). It requires a court to ensure than an agency has taken a "hard look" at the environmental affects of a planned project, but does not permit it to substitute its own judgment about the consequences of the agency's plan. *Id.* at 409-10 n.21.

We have recently decided a case similarly involving a challenge to an agency's decision not to issue an environmental impact statement. *See Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501 (6th Cir. 1995). In that case, we held that if a project's only significant impacts are beneficial, then an environmental impact statement is unnecessary. *Id.* at 505. When reviewed under this standard, the district court's opinion here makes out a compelling case supporting the decision not to require the filing of an environmental impact statement prior to the issuance of a permit for the Linden Park basin project. Certainly, we cannot say that the finding of no significant impact was arbitrary or capricious, or that it represents an abuse of discretion.

THE MEPA DECISION

Under Michigan's environmental protection act, M.C.L. §§ 691.1201 et seq., a court may grant relief "[w]hen the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water, or other natural resources...." M.C.L. § 691.1203(1). The first determination that must be made in a MEPA case, therefore, is whether the plaintiff has presented a prima facie case. In *City of Portage v. Kalamazoo County Road Comm'n*, 355 N.W. 2d 913 (Mich. App. 1984), the Michigan Court of Appeals explained that this inquiry is twofold. First, the court must determine whether a natural resource is involved, a simple inquiry. Second, acknowledging that almost all activity adversely affects natural resources to some degree, the court must ask "whether the impact of the activity on the environment rises to the level of impairment to justify the trial court's injunction." *Id.* at 915. To make this second determination, "the court

should evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterwards." *Id.* at 915-6.

Given this standard, the district court was eminently correct in ruling that the Michigan statute would not be violated in this case. Even though there may be some adverse impact on the Rouge River after the retention basin is put into operation, clearly the pollution situation will be better than it was prior to the construction of the basin. Hence, the district court's decision that the plaintiff had failed to make out a prima facie case and its subsequent denial of an injunction under MEPA was fully justified by the record.

We adopt the findings and the rationale of the district court's opinion and AFFIRM the judgment entered by the district court in the defendant's favor.

APPENDIX B

Civil Action No. 94-74869

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

April 21, 1995, Decided
April 21, 1995, FILED

PURE WATERS INC., a not-for-profit corporation,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, Roland Harms, Director; Oakland County Drain Commission, George W. Kuhn, Commissioner; Chapter 20 Birmingham Combined Sewer Overflow Drain Board, George W. Kuhn, Chairman; City of Birmingham, Thomas M. Markus, City Manager,

Defendants.

OPINION AND ORDER DENYING PLAINTIFF'S REQUEST FOR AN INJUNCTION

Feikens, District Judge.

I. BACKGROUND

The City of Birmingham, Michigan (Birmingham), the Oakland County Drain Commission and the Chapter 20 Birmingham Combined Sewer Overflow Drain Board are in the process of constructing a large retention basin (RTB) in Linden Park, a public park in Birmingham.[1] It is the approval of the Linden Park RTB by the regulatory agencies and Birmingham that led to the filing of the complaint in this action. Defendants argue that the RTB is necessary because Birmingham has combined sewers that carry both storm water and waste water. On "dry weather days", when there is little or no precipitation or snow melt, sewage from Birmingham's combined sewers is transported to the Detroit Waste Water Treatment Plant via the Evergreen-Farmington Sewage Disposal Interceptor (Evergreen-Farmington Interceptor) and treated at that site.[2] On "wet weather days", days in which the amount of water exceeds the capacity of the Evergreen-Farmington Interceptor, due to precipitation or runoff, thirty-three overflow outfalls dump excess combined sewer waste water into the Rouge River (River or Rouge). Discharging this CSO into the Rouge without treatment

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[1] 10% of the RTB is constructed. March 22, 1995, Injunction Hearing Tr. at II-150. At final argument defendant Birmingham said that it had already spent one million five hundred thousand dollars on the project.

[2] Birmingham's combined sewers are tributaries to four individual collection areas: the Birmingham CSO area; the Bloomfield CSO area; the Acacia Park CSO area; and the Twelve Towns CSO District. This Linden Park RTB only addresses CSO control for the Birmingham CSO area.

jeopardizes the health and welfare of the people in the communities on the Rouge, because the CSO contains elevated levels of disease causing organisms, human waste material, solid waste particles, fertilizer and toxic industrial waste. Simply preventing all discharge of CSO into the Rouge on wet weather days is no solution, since that would force the Evergreen-Farmington Interceptor to become congested and basement flooding, toilet-backups and other similar problems would occur. Instead, it is necessary to limit the amount of discharge of untreated CSO into the River as much as possible, without allowing the Evergreen-Farmington Interceptor to backup. The RTB will accomplish this task by impounding the majority of the CSO and bleeding it back into the Evergreen-Farmington Interceptor on dry weather days. The remainder of the CSO will be treated and released into the Rouge. The parameters of the RTB are discussed further herein.

Defendant Michigan Department of Natural Resources (MDNR) is involved in this case for two reasons. First, under the mandate of the Clean Water Act (Act), 33 U.S.C. § 1251 et seq., and as the agent of the Environmental Protection Agency (EPA), MDNR regulates the discharge of CSO. In fulfilling this duty MDNR issues National Pollution Discharge Elimination System (NPDES) permits. These permits require communities to follow the strictures of the Act as closely as possible, but recognize that complete and instantaneous elimination of pollution is impossible and, therefore, allow communities to discharge CSO into bodies of water when necessary. Second, MDNR is responsible for insuring that public and private entities follow federal and state environmental guidelines. This responsibility includes preparing Environmental Assessments (EA) and Findings of

No Significant Impact (FONSI) after appraising proposed construction that may affect the environment.

Plaintiff is a not-for-profit membership organization composed primarily of citizens living in and around Birmingham. Members of Pure Waters, Inc. include citizens who live adjacent to Linden Park. Plaintiff's complaint states that the process leading to approval of the Linden Park RTB and defendant MDNR's EA and FONSI fail to meet the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., the Michigan Environmental Protection Act (MEPA), Michigan Compiled Laws §§ 691.1201 et seq., applicable state and federal water quality standards under the Act, 33 U.S.C. § 1251 et seq., and defendants' NPDES permit. In support of its request for an injunction, plaintiff alleges that it will suffer irreparable harm because defendants refused to evaluate water quality compliance for discharge of partially treated CSO under the Act and the NPDES permit, failed to observe chlorine standards under NEPA and MEPA, and violated NEPA and MEPA in refusing to assess groundwater problems at the Linden Park site and the feasibility of sewer separation.

Defendants proffer the following counter-arguments: (1) plaintiff cannot meet the preliminary injunction standard; (2) plaintiff cannot show a significant environmental impact under NEPA; (3) plaintiff cannot establish a prima facie case under MEPA; and (4) plaintiff's action is barred by the doctrine of laches.

On December 14, 1994, plaintiff moved for a temporary restraining order (TRO) to halt the construction of the RTB. At the hearing it became evident to me that

plaintiff's objections were not substantial. It appeared that plaintiff's aim was to prevent the building of the RTB and to substitute therefor a system of separated sewers throughout Birmingham. Plaintiff also argued that construction of the RTB would increase pollution in the Rouge.

In an opinion dated December 23, 1994, I ruled that defendants considered the sewer separation alternative and rejected it for appropriate reasons and that plaintiff's concerns as to the discharge of water quality into the Rouge River were without foundation. I offered plaintiff an opportunity for a further hearing on its conjoined motion for a preliminary injunction. Plaintiff declined this offer. Plaintiff then appealed to the United States Court of Appeals for the Sixth Circuit and requested that that court stay the denial of the TRO, enjoin all activities pending appeal, and grant a TRO until I conducted a hearing on a preliminary injunction. Plaintiff's appeal was denied on January 19, 1995.

Subsequent to this denial, plaintiff filed a motion for a preliminary injunction.[3] On March 22, 1995, I heard plaintiff's motion. At a full evidentiary hearing plaintiff advanced essentially the same arguments to support an injunction that it offered to support a temporary restraining order.

Prior to examining the issues now raised, it is important that I again fully explain the process leading to approval of the Linden Park RTB. On October 19, 1989, the

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[3] Although plaintiff's motion is for a preliminary injunction, I will treat it as a motion for a permanent injunction.

Michigan Water Resources Commission issued NPDES permits to the communities in the Rouge Watershed. The permits applied to combined sewer overflow discharges. All Rouge combined sewer overflow program requirements were developed to reflect the goals of the Rouge River Remedial Action Plan (Rouge R.A.P.), that goal being the elimination of raw sewage discharges and protection of the public health by the year 2005.[4]

The Rouge R.A.P. established three phases for CSO control. The first phase was to operate, repair and maintain the existing facilities to minimize the discharge or raw sewage while planning was concluded for adequate control. Phase two required that CSO's be controlled to eliminate the discharge of raw sewage, and protect the public health by the year 2005.[5] Phase three requires that additional controls be applied, if necessary, to comply with water quality standards at times of discharge.

Thereafter, Detroit, Wayne and Oakland Counties filed a petition before me, requesting that I take jurisdiction over these permit questions. I ruled that I had pendent jurisdiction over the "time and manner in which the parties deal with wet weather flows governed by permit standards." I appointed Dr. Jonathan W. Bulkley of the University of Michigan as Court Monitor, to attempt to negotiate a settlement of these

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[4] The Rouge R.A.P. was published by the Southeast Michigan Council of Governments (SEMCOG) in 1988.

[5] The Linden Park RTB will allow Birmingham to satisfy phase two of the Rouge R.A.P.

issues. While administrative hearings proceeded before the Water Resources Commission, Dr. Bulkley involved the contesting parties and the regulatory agencies in negotiations, which resulted in a settlement agreement dated June 28, 1991. The document was informally called the "Bulkley Settlement." In accordance with this settlement, the permits issued on October 19, 1989 were revised, and on August 20, 1992, these revised permits were reissued. If Birmingham does not comply with the terms of the NPDES permits, it will violate state and federal law and be subject to significant penalties.

In 1992 defendants began to pursue federal grants through the Rouge River National Wet Weather Demonstration project, apply for State Revolving Loan Fund low interest loans and gather proposals to build a system to control CSO. On March 1, 1993, Hubbell, Roth & Clark, Inc. Consulting Engineers (HR&C) submitted a draft proposal recommending the Linden Park RTB.

In May of 1993 an Ad Hoc Citizens Committee (Committee) appointed by the Birmingham City Commission began hearings on the Linden Park RTB.[6] It is not disputed that the Committee met over twenty times in the summer of 1993 to hear comments concerning the Linden Park proposal and other suggestions for rectifying the CSO problem. On July 22, 1993 the Committee heard testimony from individuals who supported the proposal plaintiff now supports. After reviewing the testimony, the Committee

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[6] The committee consisted of seven citizens of Birmingham. Four of these citizens lived near the Linden Park site.

considered the environmental and economic impact of all the alternatives. The Committee then recommended the Linden Park RTB plan submitted by HR&C to the Birmingham City Commission. This public participation was a major factor in approving the Linden Park RTB. Evidence of this is the FONSI which states the following:

> VII. PUBLIC PARTICIPATION
> Public participation was the key issue in the evaluation of alternatives and was a critical element in the selection of the proposed project. Numerous newspaper articles have featured the project, along with the other CSO control projects in this area. Newsletters were mailed out and public meetings were held to discuss and inform residents of the project. The public hearing was held on March 29, 1993, at the Birmingham City Commission Room. A presentation was made of the project plan, including the alternatives considered, the environmental impacts anticipated, and the estimated costs. Significant opposition was voiced at this hearing, including concerns over the disruption of Linden Park, loss of property values, destruction of trees along the routes of the collecting sewers, and future requirements for CSO control. In an effort to optimize social acceptability and project implementability, the Citizen's (sic) Advisory Committee, referenced earlier, was established. Following the additional evaluation, described previously, and solicitation of public input, using the committee as a forum to resolve

> concerns, a resolution was passed by the city commission approving and agreeing to implement the modified Linden Park alternative.

Michigan Department of Natural Resources, June 1, 1994, Finding of No Significant Impact at p. 23.

On October 19, 1993 MDNR notified Birmingham that the Linden Park plan satisfied the requirements of the NPDES permits. Based on that approval, and the recommendation of the Committee, the Birmingham City Commission passed a resolution approving the Linden Park plan.

MDNR continued to appraise the project to determine its impact on the environment. In May of 1994 MDNR completed its EA and shortly thereafter, on June 1, issued a FONSI which stated:

> IX. REASONS FOR CONCLUDING NO SIGNIFICANT IMPACTS
> The water quality benefits anticipated from this project are expected to outweigh the short-term adverse construction impacts. No long-term significant adverse impacts are associated with the project.

Michigan Department of Natural Resources, June 1, 1994, Finding of No Significant Impact at p. 23. Issuance of the FONSI initiated a public notice and comment period which ended July 1, 1994. A week later MDNR advised defendants that the Linden Park plan met all environmental requirements

and was approved based on the EA, FONSI and public comments received during the comment period.

As is evident from the intense scrutiny the Linden Park RTB received, several alternative plans were considered. The two principal alternatives were the Linden Park RTB, which was approved, and a plan to separate the sewers,[7] the plan supported by plaintiff, which was rejected. A brief description of the alternatives is necessary to illuminate the contentions of the parties.

The Linden Park RTB is connected to the combined sewers. Under this alternative eighty to eighty-five percent of the CSO from heavy rainfall events will be retained in the Linden Park RTB and bled back into the Evergreen-Farmington Interceptor on dry weather days. On exceptionally heavy wet weather days, known as one year/ one hour storms,[8] CSO will be released into the Rouge.[9] This CSO will still pass through the RTB which will provide thirty

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[7] The term "separated sewers" refers to a sewage system which uses one set of sewers to carry storm water run-off and another set to carry human and industrial waste.

[8] This means that one inch of rain will accumulate uniformly across the drainage area during one hour. See Birmingham CSO Area Project Plan, p. I-4.

[9] A total of nine and a half-million gallons can be stored in the system. The RTB has a capacity of five and a half-million gallons and an eleven foot tunnel that runs from Linden Park to Booth Park has a capacity of four million gallons. See March 22, 1995, Injunction Hearing Tr. at II-175.

minutes of detention, with skimming, settling and disinfection prior to discharge. When weighing the benefits of the system mentioned above, defendants also considered several additional factors, including, the amount of energy and chemical consumption, manpower needs, the discharge of chlorine into the Rouge, short-term construction, and cost, which the parties agree is $29,861,000.

Under the second alternative, all combined sewers in the Birmingham area would be separated. This would be accomplished by constructing new storm sewers to serve all existing storm water sources or constructing new sanitary sewers. In either case, approximately 200,000 feet of new sewer are required. This approach would eliminate all discharge of human and industrial waste into the Rouge. Untreated, contaminated storm-water runoff would flow directly into the Rouge, however.

Several problems are present in the plan to separate sewers. Construction would be required for two to three years in approximately eighty percent of Birmingham's streets. Many streets would be closed during construction and trees that have grown near sewage lines would be removed. In addition, records of sewage and utility upgrades in Birmingham are poor, and construction would have to be delayed to determine where the sewage system runs and how to avoid utility lines. Sewer separation also requires excavation and construction on private property, which is significant because of the large number of easements that defendants would need to acquire.

The cost for this alternative varies according to the precise dimensions of the plan. If the plan called for new

storm sewers, the cost would be $48,415,000. If new sanitary sewers were connected to each household, with footing drain removal, the cost reaches $ 64.5 million dollars. If new sanitary sewers were constructed with no footing drain removal, the cost would be $44.7 million dollars; but due to the absence of footing drains, this option still requires a 4.5 million gallon RTB at Linden Park.

II. ANALYSIS

A. Injunction

Plaintiff requests an injunction to halt construction of the Linden Park RTB. A federal court will issue an injunction when a party can show irreparable harm and inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982). Prior to the grant of an injunction, "a court must balance the interests of the parties and give particular attention to the public consequences of a decree." Charter TP. of Huron, *Mich. v. Richards*, 997 F.2d 1168, 1175 (6th Cir. 1993). "[A] substantial threat of impending injury is necessary to justify the imposition of an injunction." *Chem-Trend Inc. v. McCarthy*, 780 F. Supp. 458, 460 (E.D. Mich. 1991). As these cases illustrate, before issuing an injunction in this case I must decide that the likelihood of plaintiff sustaining irreparable harm is so great that it outweighs the public interest.

The public's interest in this case is substantial. First, due to the nature of this problem the public health is at risk if solutions are delayed. Second, halting construction may waste the one million five hundred thousand dollars defendants have

already spent on the Linden Park project. Third, the Linden Park plan was approved by Birmingham only after citizens participated in the process by attending City Commission and Committee hearings on the subject. Fourth, time and money were spent researching, litigating and documenting the objectives and problems discussed in the EA, FONSI and the voluminous CSO project plan. Deference to the public interest demands that this court examine carefully any claim that will waste the public's time and money and that may place the health of citizens in jeopardy.

Plaintiff argues that it is irreparably harmed by construction of the Linden Park RTB because NEPA and MEPA were not followed during the approval stages. If these statutes were violated, such harm may outweigh the public's interest. An examination of the facts reveals the vacuity of plaintiff's argument, however.

B. NEPA

NEPA directs agencies to examine the environmental consequences of proposed projects and to provide statements which explain:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the

> maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989); 42 U.S.C. @ 4332(C).

> "NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."

Methow Valley Citizens Council, 490 U.S. at 350 (citations omitted). An agency must determine whether an environmental impact statement is necessary after preparing an EA and issue a FONSI if the agency decides not to prepare an environmental impact statement. 40 C.F.R § 1501.4(c), (e).

In this case defendant MDNR prepared an EA which met all the requirements listed in 42 U.S.C. 4332(C). After a public comment period MDNR issued a FONSI. These two actions satisfy NEPA. 40 C.F.R § 1501.4(c), (e). Plaintiff wants to quarrel with the findings in the documents by pointing to the amount of chlorine that will be released into the Rouge, possible groundwater problems, resulting water

quality and the feasibility of sewer separation. While defendants' conclusions are not to plaintiff's liking, it is clear from the voluminous materials filed with this Court, that defendant MDNR, with the assistance of the other defendants and the citizens of Birmingham, did consider potential problems associated with the Linden Park RTB plan and possible alternatives. See March 22, 1995, Injunction Hearing, Tr. at II-108; EA p. 6-9; Birmingham CSO Area Project Plan §§ III-VI; Minutes, Ad Hoc Citizens Advisory Committee Meetings, May 12, 1993, July 8, 1993, July 22, 1993. Defendant MDNR and the other parties simply concluded that any possible negatives associated with the proposal were greatly outweighed by the positive attributes of the Linden Park RTB. This is acceptable under NEPA. *Methow Valley Citizens Council*, 490 U.S. at 350. Thus, defendants' actions satisfy the requirements of NEPA in form and in substance.

C. MEPA

Plaintiff's MEPA claim is also without merit. MEPA "imposes a duty on individuals and organizations . . . to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities." *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 306, 224 N.W.2d 883 (1975). Under MEPA, the trial court must conduct a dual inquiry to determine whether plaintiff can establish a prima facie case: (1) whether a natural resource is involved; and (2) whether the impact of the activity on the environment rises to the level of impairment. *Kent Rd. Comm. v. Hunting*, 170 Mich. App. 222, 233, 428 N.W.2d 353 (1988). "In answering the latter question, the trial court should evaluate the environmental situation before the proposed

action and compare it with the probable condition after [the action is implemented]." *Id.* at 233. The word "impair", in this context, means "to weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner." *Michigan United Conservations Clubs v. Anthony*, 90 Mich. App. 99, 105, 280 N.W.2d 883 (1979) (emphasis omitted).

Construction of the Linden Park RTB will improve the quality of water in the Rouge dramatically. The RTB will reduce the number of CSO events from forty to sixty times per year to approximately six to nine per year. Currently two hundred twenty million gallons per year of combined sewage are dumped into the Rouge; the RTB will reduce this figure to about forty-three million gallons per year. Thus, when the RTB is complete, eighty percent of overflow volumes will be captured. The small amount of CSO that is not captured will be treated prior to being dumped into the Rouge. Therefore, the Rouge will be significantly cleaner after the RTB is constructed than it is now.

Despite this fact, plaintiff contends that the RTB will impair the environment. Therefore, an examination of those factors which plaintiff deems adverse effects is necessary. *Kent Rd. Comm.*, 170 Mich. App. at 233. The primary adverse impact, according to plaintiff, is the discharge of approximately eight
hundred sixty gallons of sodium hypochlorite into the Rouge per year. It is undisputed, however, that defendants considered this factor and arranged for testing to assure that the chlorine discharge complies with applicable standards and designed the RTB so that it can accommodate dechlorination equipment. Another effect of the RTB is short-term damage

to Linden Park. This damage is limited to the construction period and will not be noticeable after landscaping. For example, although two hundred trees must be removed during construction, landscaping plans call for the planting of four hundred trees and two hundred bushes. When comparing the minimal "adverse" effects of the RTB to its beneficial impact, it is obvious that plaintiff's reasoning turns MEPA on its head.[10] In short, there is no evidence that the Linden Park

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[10] In view of this finding the court notes nonetheless that a contention can be made that MEPA is preempted by federal laws which regulate water pollution.

RTB will "impair" the environment. Therefore, plaintiff cannot establish a prima facie case under MEPA.[11]

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[11] At the hearing Plaintiff spent a considerable amount of time attempting to show that sewer separation was a more feasible and prudent alternative than the Linden Park RTB because of an artesian aquifer at the site. Due to the fact that Plaintiff cannot establish a prima facie case under MEPA, it is unnecessary for defendants to explain why sewer separation is not a feasible and prudent alternative. Ray, 393 Mich. at 312. This said, I will briefly discuss plaintiff's claim to show that defendants did consider the effect of the artesian aquifer on the RTB.

According to Plaintiff the small artesian aquifer might be connected to a much larger artesian aquifer. If this is true, and the larger aquifer is punctured by construction, the water pressure in the well may cause the soil surrounding the basin to collapse and water would rush into the area surrounding the RTB. This effect, called a "blow-out" condition, would mean that the RTB would eventually "float" in water. Plaintiff believes this is important because such a scenario would drastically increase the cost of the RTB and thus, make sewer separation a more economically viable alternative than the RTB.

Uncontroverted testimony shows that plaintiff's "doomsday" scenario is unlikely to occur. Four test boring holes were dug at the Linden Park site to test soil composition. One of these boring holes is an observation well which monitors water pressure. At this time "de-watering" is taking place in that well at the pace of ten gallons a minute. This fact leads defendants, and this court, to believe that there is little chance of a blow-out occurring at the site. See March 22, 1995, Injunction Hearing Tr. at II-123. Despite this conclusion, defendants have taken the precautionary measure of providing an even larger on-site de-watering system which will pump up to 200 gallons per minute. See March 22, 1995, Injunction Hearing, Tr. at I-73 and II-119. Thus, plaintiff's contention is without merit.

D. Public Interest

Due to the fact that building the Linden Park RTB does not violate NEPA or MEPA, plaintiff's claim of irreparable harm is without merit. Therefore, the public interest in allowing construction of the Linden Park RTB easily outweighs the alleged harm plaintiff will suffer if an injunction is not issued.
For this reason I refuse to issue an injunction in this case.

E. Laches

Due to the disposition of the injunction in this manner, discussion of defendants' laches defense is unnecessary.

IV. CONCLUSION

Accordingly, plaintiff's motion for an injunction is DENIED and construction of the Linden Park Retention Basin will proceed as scheduled. IT IS SO ORDERED.

APPENDIX C
THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

THOMAS J. ANDERSON, GORDON ROCKWELL ENVIRONMENTAL PROTECTION ACT OF 1970

691.1201. Short Title

Sec. 1. This act, shall be known and may be cited as the "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970."

691.1202. Actions for declaratory and equitable relief; parties; standards for pollution or anti-pollution devices or procedure.

Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

(2) In granting relief provided by subsection (1) where is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

691.1202a. Surety bonds or cash, posting to secure costs or judgments.

Sec. 2a. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed $500.00.

691.1203. Prima facie showing of pollution, rebuttal; affirmative defenses; burden of proof; weight of evidence; masters or referees; apportionment of costs.

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant

may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

691.1204. Granting equitable relief; imposition of conditions; remitting parties to other proceedings; judicial review.

Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the

defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Complied Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

691.1205. Intervention; determination as to pollution; collateral estoppel; res judicata.

Sec. 5. (1) Whenever administrative, licensing or other proceedings, and judicial review thereof are available

by law, the agency or the court may permit the attorney general, any political subdivision of the state, and instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

(2) In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

691.1206. Act supplementary.

Sec. 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.

691.1207. Effective Date.

Sec. 7. This act shall take effect October 1, 1970.

No. 96-56

Supreme Court, U.S.
FILED
AUG 12 1996
OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1995

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMS, DIRECTOR; OAKLAND COUNTY DRAIN COMMISSION, GEORGE W. KUHN, COMMISSIONER; CHAPTER 20 BIRMINGHAM SEWER OVERFLOW DRAIN BOARD, GEORGE W. KUHN, CHAIRMAN; CITY OF BIRMINGHAM, THOMAS M. MARKUS, CITY MANAGER

Respondents.

RESPONDENT CITY OF BIRMINGHAM'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in ruling that the FONSI (finding of no significant impact) based on the Michigan Department of Natural Resources' Environmental Assessment satisfied the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331 et seq.

II.

Whether the Court of Appeals erred in ruling that Petitioner, PURE WATERS, INC., failed to present a prima facia case that the construction of the sewage retention basin is likely to pollute, impair or destroy the air, water or other natural resources of Michigan in violation of Michigan Environmental Protection Act ("MEPA"), MCL §691.1201 et seq.

III.

Whether the Court of Appeals was correct in not considering the National Pollution Discharge Elimination System ("NPDES") permit's monitoring of the Rouge River and implementation of additional controls, if necessary, as an improper segmentation under NEPA.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. *Nature of the Case*	1
B. *Proceedings in the District Court*	2
C. *Decision in the District Court*	3
D. *Proceedings in the Court of Appeals*	4
PETITIONER'S MISSTATEMENTS OF FACT AND LAW	5
A. *Petitioner's Question No. 1 is Misleading*	5
B. *Petitioner's Statement of the Case is Misleading and Defective*	5
SUMMARY OF ARGUMENT	6
1. *NEPA Issue*	6
2. *MEPA Issue*	6
3. *Segmentation Issue*	6
ARGUMENT	7
I. THE ENVIRONMENTAL ASSESSMENT AND FONSI SATISFIED THE PROCEDURAL REQUIREMENTS OF NEPA	7
II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MEPA WAS NOT VIOLATED BECAUSE THE LEVEL OF IMPAIRMENT WAS NOT MET IN ORDER TO JUSTIFY JUDICIAL INTERVENTION	11
III. THERE WAS NOT AN IMPROPER SEGMENTATION OF THE PROJECT UNDER NEPA	12
CONCLUSION	14

INDEX OF AUTHORITIES

CASES	PAGE(S)
Catron v U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996)	9
City of Portage v Kalamazoo County Road Commission, 136 Mich App 276, 281; 355 N.W.2d 913 (1984)	12
Cronin v U.S. Department of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990)	8
Dafter Sanitary Landfill v Department of Natural Resources, 198 Mich App 499, 503-504; 499 N.W.2d 383 (1993)	12
Dickman v City of Santa Fe, 724 F.Supp. 1341, 1345 (D. N.M. 1989)	13
Environmental Defense Fund v Marsh, 651 F.2d 983 (5th Cir. 1981)	9, 10
Friends of Fiery Gizard v Farmer's Home Administration, 61 F.3d 501, 504-505 (6th Cir. 1995)	9, 10
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Hiram Clark Civic Club, Inc. v Lynn, 476 F.2d 421 (5th Cir. 1973)	10
Kent Road Commission v Hunting, 170 Mich App 222, 233; 428 N.W.2d 353 (1988)	11
Michigan United Conservation Clubs v Anthony, 90 Mich App 99, 105; 280 N.W.2d 83 (1978)	11
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PAGE(S)

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Preservation Coalition, Inc. v Pierce, 667 F.2d 851, 855 (9th Cir. 1982) 9

Robertson v Methow Valley Citizen's Council, 490 U.S. 332, 348; 109 S.Ct. 1835 (1989) ... 7

Stryker's Bay Neighborhood Council, Inc. v Karlen, 444 U.S. 223, 227; 100 S.Ct. 497, 500 (1980) 9

U.S. v South Florida Water Management District, 847 F.Supp. 1567 (S.D. FL. 1982), affirmed in part, reversed in part, and remanded on other grounds, 28 F.3d 1563 (11th Cir. 1994), cert denied __ U.S. __, 115 S.Ct. 1956 ..... 10, 11

STATUTES

16 U.S.C. §1531-44 9

33 U.S.C. §1251 et seq. 1

42 U.S.C. §4331, et seq. 1

42 U.S.C. §4332(C) 3, 7

MCL §691.1201, et seq 1

REGULATIONS

40 C.F.R. §1501.4(c), (e) 7

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, PURE WATERS, INC. ("Pure Waters"), is seeking declaratory and injunctive relief against Respondents, including the CITY OF BIRMINGHAM ("Birmingham"). Petitioner alleges that Respondent, MICHIGAN DEPARTMENT OF NATURAL RESOURCES' ("MDNR"), issuance of a finding of no significant impact ("FONSI") concerning the construction of a combined sewer overflow retention treatment basin in Linden Park in Birmingham, Michigan, was a violation of both the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331, et seq. and the Michigan Environmental Policy Act ("MEPA"), MCL §691.1201, et seq. This claim is made despite MDNR's detailed preparation of an environmental assessment ("EA"), Birmingham's appointment of a citizen's committee to hold public hearings and the consideration of several project alternatives, environmental impacts, benefits and costs.

Birmingham selected, and MDNR approved, a combined sewer overflow retention treatment basin in Linden Park so that combined sewer overflow ("CSO") would be controlled and the discharge of raw sewage into the Rouge River would be eliminated, thereby improving the public health and safety[1]. A national pollution discharge elimination system ("NPDES") permit required Birmingham to control its CSOs. The permit established three (3) phases for the irradication of the damage to the Rouge River caused by untreated sewage. The first stage was for Birmingham

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[1] As a result of litigation commenced in the Federal District Court for the Eastern District of Michigan in 1977 by the Environmental Protection Agency under the Clean Water Act, 33 U.S.C. §1251 et seq., against the communities that made up the Rouge River watershed in southeastern Michigan, a consent judgment was entered where it was resolved that all waste waters flowing into the Rouge River would be given primary and secondary treatment. This was to be accomplished in two stages. The first stage was to handle dry water conditions, including combined sewer overflows and the second stage was to address what weather conditions, including combined sewer overflows. The first stage has been completed and the Linden Park combined sewer overflow retention treatment basin is designed to address combined sewer overflows in "wet weather" conditions.

to operate, repair and maintain it existing facilities to minimize discharge; the second stage required that CSOs be controlled to eliminate the discharge of raw sewage by the year 2005. The third phase requires that additional controls be applied, if necessary, to comply with water quality standards at times of discharge. The combined sewer overflow retention treatment basin in Linden Park will satisfy phase two of the NPDES permit. Whether any additional controls will be necessary, is speculative but will be monitored by Respondents once the project is complete so that all water quality standards will eventually be met.

Several alternatives for the combined sewer overflow program were studied, including separated sewers which Petitioner favors, and after numerous public hearings, Birmingham decided construction of a combined sewer overflow retention treatment basin was the most cost effective, least intrusive alternative and identified Linden Park as the location. As a result of this decision by Birmingham and MDNR's completion of its EA and issuance of its FONSI, bonds for the financing of the project were issued and sold and construction began in December of 1994[2].

B. Proceedings in the District Court

On September 13, 1993, Citizens to Put the Issue on the Ballot, the predecessor to Pure Waters, filed its Notice of Intent to Sue under the Clean Water Act. Pure Waters waited until December 6, 1994, after financing was secured and construction of the Linden Park retention basin had begun, to file its Amended Complaint for Declaratory and Injunctive Relief against Respondents (R.2). On December 13, 1994, Pure Waters filed, and on December 15, 1994, argued, before the Honorable John Feikens, District Court Judge for the Eastern District of Michigan, that a temporary restraining order should be issued enjoining Respondents from proceeding with their construction of the Linden Park combined sewer overflow retention treatment basin until the Court could hear Pure Waters' Motion for Preliminary

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[2] As of July 19 1996, construction of the combined sewer overflow retention treatment basin is 76% complete. The project's cumulative cost as of July 19, 1996 is $20,244,194.60. June 20, 1996-July 19, 1996 Rouge River National Wet Weather Demonstration Project Monthly Construction Status Report.

Injunction (R.8). The District Court noted that the construction of the combined sewer overflow retention treatment basin was in accordance with an NPDES permit which was issued on October 19, 1989, revised on August 20, 1992, and that the permit applied to combined sewer overflow discharges (R.14). The District Court further noted that the Rouge River in southeastern Michigan is extremely polluted and that the combined sewer overflow program was developed to enact the goals of a Rouge River Remedial Action Plan ("Rouge R.A.P."), the goal being the protection of the public health by the elimination of raw sewage discharges into the Rouge River. The District Court issued a corrected Opinion and Order denying temporary restraint and certification on December 23, 1994 (R.19). Pure Waters filed a Notice of Appeal on December 16, 1994 (R.11).

The Sixth Circuit Court of Appeals dismissed Pure Waters' appeal, sua sponte, for lack of jurisdiction on January 19, 1995 (R.29). Pure Waters renewed its Motion for Preliminary Injunction on January 24, 1995 (R.27) and an evidentiary hearing was held on March 22–24, 1995.

C. Decision in the District Court

The District Court found that Birmingham will violate state and federal laws and be subject to significant penalties if it fails to comply with its NPDES permit. After listening to the testimony and reviewing the briefs filed, the District Court held that MDNR prepared an EA which met all of the requirements of NEPA, 42 U.S.C. §4332(C) and, after providing an opportunity for public comment, issued a FONSI (R.63, p.13). The District Court held that this action complied with the procedural mandates of NEPA (R.63, p.13).

After examining Pure Waters' MEPA claim, the District Court held that the construction of the Linden Park combined sewer overflow retention treatment basin will drastically improve the quality of the water in the Rouge River and that any "minimal" adverse affect of the combined sewer overflow retention treatment basin is greatly outweighed by the obvious benefits of the combined sewer overflow retention treatment basin (R.63, p.14). The District Court found no evidence that the Linden Park combined sewer

overflow retention treatment basin will "impair" the environment. The District Court was persuaded that the Respondents had, indeed, considered the potential problems with the Linden Park combined sewer overflow retention treatment basin and concluded that the Respondents had incorporated into their construction project protections for the environment to minimize any negative impacts which might possibly result. The District Court also noted that the project provided for monitoring of water quality after construction. The District Court recognized that the Rouge River did not presently meet water quality standards, and could not immediately achieve water quality standards irrespective of what action plan was adopted. The District Court held that Pure Waters had failed to establish a prima facie case of "impairment" under MEPA.

D. Proceedings in the Court of Appeals

Petitioner appealed the District Court's April 21, 1995 Opinion and Order Denying Plaintiff's Request for an Injunction. The Court of Appeals affirmed the District Court's findings that MDNR had complied with the procedural mandates of NEPA and Petitioner had failed to establish a prima facia case of "impairment under MEPA". The Court of Appeals also found that the District Court's decision to decline to grant Petitioner's request for an injunction was proper.

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

A. Petitioner's Question No. 1 is Misleading

Petitioner's statement of question number 1 is inaccurate and misleading:

> Whether a court may rule, as a matter of law, that a project's significant impacts are all beneficial and therefore, no further NEPA evaluation is required, an issue in which the courts of appeals are in conflict? (Petition, p.i)

Petitioner's question suggests that the issue is whether NEPA evaluation is required if a project's impacts are all beneficial. However, both the District Court and the Court of Appeals noted that the purpose behind NEPA is to insure that agencies consider the environmental impact of their decisions and take a "hard look" at the environmental effects of a planned project. The question is, rather, whether the agency's decision after an environmental assessment, FONSI, and decision to not issue an environmental impact statement, in a project designed solely to benefit the environment with no significant adverse effects, is arbitrary, capricious or an abuse of discretion.

B. Petitioner's Statement of the Case is Misleading and Defective

Petitioner states "that from the very beginning, the proposed project was conceded as inadequate to meet state or federal water quality requirements." (Petition, p.4) This is inaccurate. Despite passing references to the significant pollution currently existing in the Rouge River watershed system, Petitioner does not want to acknowledge the pollution when looking at the project selected by Respondents to deal with combined sewer overflow. This pollution cannot be ignored. Then Rouge River is not a pristine river. It is one of the most polluted rivers in the country. Birmingham was required to address combined sewer overflow discharges. The Linden Park retention treatment basin corrects this problem and will be monitored, as provided in Birmingham's NPDES permit, so that eventual water quality standards are obtained.

SUMMARY OF ARGUMENT

1. NEPA Issue

NEPA is designed to prevent environmental degradation. It requires that environmental problems created by a federal project be considered before the project is undertaken. MDNR's environmental assessment and FONSI recognized the possible environmental concerns of the project and determined that the benefits to the environment do not warrant the time and expense of preparing an environmental impact statement. The District Court and the Court of Appeals correctly determined that Respondents had complied with the procedural requirements of NEPA and that the FONSI was not arbitrary and capricious.

2. MEPA Issue

MEPA provides relief when a plaintiff has made a prima facia showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources. The District Court and Court of Appeals correctly determined that Respondents' combined sewer overflow retention treatment basin would not impair the environment.

3. Segmentation Issue

In reviewing the NPDES permit's phased approach, the Court of Appeals was correct in declining to find an improper segmentation of a project under NEPA.

ARGUMENT

I. THE ENVIRONMENTAL ASSESSMENT AND FONSI SATISFIED THE PROCEDURAL REQUIREMENTS OF NEPA

Contrary to Petitioner's suggestion, their real objection is not NEPA's application but the particular results chosen by Respondents. The Court of Appeals affirmed the District Court's opinion and order that Respondents had complied with NEPA.

> NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.

Robertson v Methow Valley Citizen's Council, 490 U.S. 332, 348; 109 S.Ct. 1835 (1989). An agency must determine whether an EIS is necessary after preparing an environmental assessment and issue a FONSI if the agency decides not to prepare an EIS. 40 C.F.R. §1501.4(c), (e). MDNR prepared an environmental assessment that met all requirements of 42 U.S.C. §4332(C) and issued a FONSI.

In 1989, the Michigan Water Resources Commission issued a NPDES permit to Birmingham that required the control of its combined sewer overflows by 1997. The permit established three phases for the correction of the problem of untreated sewage flowing into the Rouge River. In the first stage, Birmingham would operate, repair and maintain its existing facilities to minimize combined sewer overflow discharges. The second stage required that combined sewer overflow controls be implemented to eliminate the discharge of untreated overflows for the protection of the public health. Stage three required that the combined sewer overflow controls be evaluated and that further controls, if necessary, be implemented to meet water quality standards.

Birmingham appointed a citizen's committed to study Birmingham's compliance with the NPDES permit. Public hearings were held, engineers were hired to study several areas of

alternatives and identify economic and environmental impacts of the various alternatives. After several months of study, Birmingham identified the Linden Park combined sewer overflow retention treatment basin as the best method for Birmingham's compliance with the NPDES permit[3]. At the same time, MDNR was studying the Rouge problem, and reviewing Birmingham's project proposal. MDNR concluded that Linden Park combined sewer overflow retention treatment basin would remove from the Rouge River over 180 million gallons of untreated raw sewage and prevent all untreated sewage from entering the Rouge River. (R.61, pg. 79-83.) Against this benefit, MDNR recognized that some treated CSO might be introduced the Rouge River during severe storm conditions. This treated combined sewer overflow would receive primary treatment of skimming, settling and disinfectant prior to being introduced into the Rouge River. The disinfectant was to be sodium hypochlorite (a 5% chlorine solution). The annual amount of disinfectant which may be released into the Rouge River is 860 gallons (R.61, p.192).

In May of 1994, MDNR completed an environmental assessment of the Birmingham project proposal and, after an opportunity for public comment, issued its FONSI. The environmental assessment has been described as a "rough cut, low budget environmental impact statement." *Cronin v U.S. Department of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990). The environmental assessment is an established part of NEPA environmental review. *Hanly v Kleindienst*, 471 F.2d 823 (2nd Cir. 1972), cert denied, 412 U.S. 908; 93 S.Ct. 2290 (1973).

In looking at Respondents' environmental assessment, it is clear that they took the pollution of the Rouge River very seriously and spend considerable time and energy studying the impacts, costs, and benefits of the various proposals. Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure the agency has considered the

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[3] Birmingham's citizen's committee originally selected a different method of utilizing the retention basin technology which MDNR rejected because it was not cost-effective. Pure Waters' representatives participated in the citizen's committee hearings and sewer separation was considered and rejected.

environmental consequences. *Strycker's Bay Neighborhood Council, Inc. v Karlen*, 444 U.S. 223, 227; 100 S.Ct. 497, 500 (1980). As stated in *Friends of Fiery Gizzard v Farmers Home Administration*, 61 F.3d 501, 504-505 (6th Cir. 1995), "If the agency reasonably concludes, on the basis of the environmental assessment, that the project will have no significant adverse environmental consequences, the environmental impact statement is not required."

The expenditure of funds on a project that clearly improves the quality of the human environment does not make sense and is not necessary where an agency reasonably concludes on the basis of the environmental assessment "that the project will have no significant adverse environmental consequences". In this event, an environmental impact statement is not required. *Preservation Coalition, Inc. v Pierce*, 667 F.2d 851, 855 (9th Cir. 1982).

Petitioner's reliance on *Catron v U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996) is misplaced. In that case, the secretary of the U.S. Fish and Wildlife Service determined that he was not required to comply with the documentation requirements of NEPA claiming an exemption existed under the Endangered Species Act, 16 U.S.C. §1531-44, as a matter of law. *Id.* at 1432. The District Court granted Catron County's motion for partial summary judgment finding that the secretary had failed to comply with NEPA. *Catron* is completely different than the present situation. Here, MDNR acknowledges NEPA's application and complied with its requirements.

Petitioner's argument is not strengthened by its reference to *Environmental Defense Fund v Marsh*, 651 F.2d 983 (5th Cir. 1981). In that case, an EIS was prepared by the Army Corps of Engineers for the construction of the Tennessee-Tombigbee Water Way. Subsequent to the EIS, there were major, significant substantial design changes, tripling the cost of the project, increasing the land needed by 50% (35,000 acres), flooding and waterlogging an additional 55,000 acres and increasing the amount of ground spoil to be removed by 9 million cubic yards. It was

clear that the changes had a "significant adverse impact" on the environment. The focus of that case, as opposed to the present situation, was not on a project designed solely to benefit the environment.

Interestingly, both *Environmental Defense Fund v Marsh*, 651 F.2d 983 (5th Cir. 1981) and *U.S. v South Florida Water Management District*, 847 F.Supp. 1567 (S.D. FL. 1982), affirmed in part, reversed in part, and remanded on other grounds, 28 F.3d 1563 (11th Cir. 1994), cert denied __ U.S. __, 115 S.Ct. 1956, which were referenced by Petitioner rely on *Hiram Clark Civic Club, Inc. v Lynn*, 476 F.2d 421 (5th Cir. 1973) which, in dicta, references the need for an EIS for significant beneficial impacts.

Hiram Clark is outdated, only dicta, and did not focus on the consequences of requiring an EIS where the only impact was beneficial. The Sixth Circuit Court of Appeals in *Friends of Fiery Gizzard v Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995), was cognizant of the costs involved in preparing an environmental impact statement. In that project, the environmental assessment forecast a purely beneficial impact on the living environment. The Court of Appeals noted that the purpose of NEPA was to ensure that the environmental impact of federal actions was considered. With that in mind, the court of appeals stated that if the agency reasonably concludes on the basis of the environmental assessment, "that the project will have no significant adverse environmental consequences," an environmental impact statement is not required. The Court of Appeals noted that in the years since that 1973 case, there has been "a growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially." *Id.* at 505, citing *River Road Alliance, Inc. v Corps of Engineers of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985).

MDNR conducted a detailed environmental assessment study of the project and determined that there would be no significant adverse effects on the environment. The very purpose of the project is to improve the environment and the record indicates

that the project will substantially reduce pollution to the Rouge River and that there are no significant adverse effects on the human environment by the combined sewer overflow retention treatment basin. Noting NEPA's original purpose was to promote preservation and enhancement in the environment, courts have noted the irony of the use of NEPA as a device to frustrate actions intended to benefit the environment. *U.S. v South Florida Water Management District*, 847 F.Supp. 1567, 1580 (S.D. Fla 1992), Aff'd in part, rev'd in part and remanded on other grounds, 28 F.3d 1563 (11 Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1956, 131 L.Ed.2d; *Pacific Legal Foundation v Andrus*, 657 F.2d 829 (6th Cir. 1981).

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MEPA WAS NOT VIOLATED BECAUSE THE LEVEL OF IMPAIRMENT WAS NOT MET IN ORDER TO JUSTIFY JUDICIAL INTERVENTION

The Michigan Court of Appeals has identified what is necessary for the plaintiff to establish a prima facia case of a MEPA violation: (1) whether a natural resource is involved; and (2) whether the impact of the activity on the environment rises to the level of ***impairment***. *Kent Road Commission v Hunting*, 170 Mich App 222, 233; 428 N.W.2d 353 (1988). The District Court, affirmed by the Court of Appeals, determined that plaintiff's MEPA claim is without merit. Petitioner claims that the construction of the Linden Park combined sewer overflow retention treatment basin will impair the environment. What does it mean to impair the natural resources of the air or the water? In *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105; 280 N.W.2d 883 (1978), the court cited *Ray v Mason*, 393 Mich 294, 306; 224 N.W.2d 883 (1975) as providing the MEPA standard of review and defined the word "impair" citing from Black's Law Dictionary as follows:

> To weaken, to make worse, to lessen, empower, diminish, or relax, or otherwise effect in an injurious way.

Construction of the Linden Park combined sewer overflow retention treatment basin will dramatically improve the quality of

the waters in the Rouge River. From an average of 220 million gallons per year of combined sewage being dumped into the Rouge River, the Linden Park combined sewer overflow retention treatment basin will reduce this number to approximately 43 million gallons per year. Additionally, the portion that still may be discharged into the Rouge River will be skimmed, settled and disinfected so that the outflow will be significantly cleaner than combined sewer outflow currently being discharged. In *City of Portage v Kalamazoo County Road Commission*, 136 Mich App 276, 281; 355 N.W.2d 913 (1984), a Michigan Court of Appeals indicated that "a court is not empowered to enjoin any conduct which does not rise to the level of an environmental risk prescribed by MEPA. Citing *Committee for Sensible Land Use v Garfield Township*, 124 Mich App 559, 564 (1983).

Dafter Sanitary Landfill v Department of Natural Resources, 198 Mich App 499, 503-504; 499 N.W.2d 383 (1993), set forth the threshold test for courts to utilize and determine whether the impact of a proposed action is so significant as to constitute an environmental risk and require judicial intervention. In applying the *Dafter* criteria, it is clear that Petitioner failed to show that the combined sewage overflow retention treatment basin rises to the level of impairment contemplated under MEPA. The environmental analysis performed by MDNR identified specific steps that would minimize environmental impact and the District Court correctly applied MEPA in determining that Plaintiff had failed to establish a prima facia case. Petitioner erroneously claims that the sole purpose of the project was to meet water quality standards. The federal action and consent judgment entered in the District Court mandated that Birmingham address the combined sewer overflow problem in the Rouge River. Birmingham has met that goal. MEPA was correctly reviewed by the District Court and the claim was without merit.

III. THERE WAS NOT AN IMPROPER SEGMENTATION OF THE PROJECT UNDER NEPA.

The NPDES permit issued to Birmingham recognized that complete and instantaneous elimination of pollution of the Rouge River was not feasible. Birmingham and MDNR studied several

possible alternatives to address combined sewer overflows evaluating the benefits, costs and impacts of each alternative.

Petitioner claims that the NPDES permit was an improper segmentation of the project. This is incorrect. A result of the prior lawsuit and consent judgment of the River Rouge communities, the focus of the project was to eliminate combined sewer overflow as opposed to all water quality standards. The concept of segmentation is to divide a large or cumulative project into smaller components in order to avoid designating the project a major federal action. This has been held to be unlawful. *Park County Resource Council, Inc. v U.S. Department of Agriculture*, 817 F.2d 609, 622 (10th Cir. 1987). Generally, segmentation is claimed in highway projects which are artificially divided into smaller, less significant actions to avoid NEPA's requirements. *Dickman v City of Santa Fe*, 724 F.Supp. 1341, 1345 (D. N.M. 1989).

Petitioner mischaracterizes the purpose of the combined sewer overflow retention treatment basin. While the attainment of water quality standards is clearly the goal, the project's focus is the elimination of raw sewage discharges into the Rouge River. Segmentation did not occur in this case. The environmental assessment noted that the eventual goal was to meet water quality standards.

Petitioner claims this delay in studying and meeting water quality standards is unreasonable, unpermissible and equates to segmentation. Petitioner claims that if Respondents had considered the possible future costs of meeting water quality standards (notwithstanding the degree of speculation needed would render such an exercise essentially meaningless), Birmingham would have elected separated sewers as the project. Petitioner wants to focus on the goal of a pristine river and ignore the facts that the Rouge is one of the most polluted rivers in the nation and that destruction of thousands of trees, tearing up 80% of the roads, higher costs and disturbing private property are all legitimate factors which Respondents looked at, in addition to water quality, in deciding to construct the combined sewer overflow retention treatment basin. There was no artificial segmentation in this case.

The analysis of the environmental impacts of the project and study of the alternatives was done with an open mind and without any preordained decision as to a project plan. Petitioner's claim that Respondents attempted some type of post-hoc compliance with NEPA is simply not true. The environmental consequences of the various projects were considered and a project was selected. There was no improper segmentation in addressing the goal of compliance with water quality standards until after a study of how the combined sewer overflow retention treatment basin had improved the Rouge River by its elimination of raw sewage discharges.

CONCLUSION

In conclusion, for the foregoing reasons, Birmingham respectfully requests that this Petition For a Writ of Certiorari be denied.

Respectfully submitted,

BEIER HOWLETT, P.C.

By: _____

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Dated: August 9, 1996

No. 95-2054

In The Supreme Court of the United States

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMS, DIRECTOR; OAKLAND COUNTY DRAIN COMMISSION, GEORGE W. KUHN, COMMISSIONER; CHAPTER 20 BIRMINGHAM SEWER OVERFLOW DRAIN BOARD, GEORGE W. KUHN, CHAIRMAN; CITY OF BIRMINGHAM, THOMAS M. MARKUS, CITY MANAGER

Respondents.

APPENDIX

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APPENDIX
Table of Contents

Page

Appendix A

Rouge River National Wet Weather Demonstration Project Monthly Construction Status Report..... 1a

Appendix B

Excerpt from Detroit Free Press, July 30, 1996 ..... 7a

Appendix A

Rouge River National Wet Weather Demonstration Project
Monthly Construction Status Report

ROUGE RIVER NATIONAL WET WEATHER DEMONSTRATION PROJECT

MONTHLY CONSTRUCTION STATUS REPORT

SUBGRANTEE: Oakland County Drain Commissioner
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

This report is due on the 20th day of the month following the reporting period.

I. FINANCIAL DATA

	Cumulative Amount	% of Total $ Budget
A. CONTRACT(S) AMOUNT	$26,252,062.00	100.00
B. NET CHANGE BY WORK ORDERS	$ 263,197.47	1.00%
C. CONTRACT(S) AMOUNT TO DATE	$26,515,259.47	101.00%
D. PROJECT CUMULATIVE COST TO DATE	$20,244,194.60	76.35%
E. BALANCE REMAINING	$ 6,266,064.87	23.48%

DATE SUBMITTED: July 19,1996

CONTACT PERSON: Philip Sanzica, P.E.

ADDRESS: One Public Works Drive
Waterford, Michigan 48238

TELEPHONE NUMBER: 810-858-1031

SIGNED: /s/ Philip Sanzica
Subgrantee's Representative

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

II. ACTIVITIES REPORTING

A. ESTIMATED % OF TOTAL CONSTRUCTION COMPLETED 76.35%

B. BRIEF DESCRIPTION OF TASKS PERFORMED THIS PERIOD

Contract 1 — Basin construction has attain the following % complete in the various areas:

Walls -	87%	Baffle Beams —	75%
Columns -	84%	Precast Concrete —	70%

Control Building concrete is about 99% complete.

Mechanical piping and duct work installation in the Control Building has stopped due to the recent flooding. Miscellaneous utility piping is being installed now.

Electrical work in the Control Building is concentrating running conduit and installing panels not affected by the flooding.

Structural backfill is about 80% complete.

Work on outfall structure is about 85% compete.

Influent structure and influent conduits are about 65% complete.

(continued)

Contract 2 – On June 18, 1996, a 3" to 3.5" rain caused the Rouge River to reach a flood state resulting in the RTB and tunnel filling with water. The high water level at the RTB/Tunnel Chamber was recorded at elevation 716.7. The twenty-year and fifty-year flood stage elevations, at that location, are approximately 716.56 and 717.04, respectively.

No contract work has taken place this period, as the contractor has been pumping water, cleaning the Tunnel and repairing equipment damaged by the flood. Contract work is expected to resume in late July.

(continued)

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

II. ACTIVITIES REPORTING

A. ESTIMATED % OF TOTAL CONSTRUCTION COMPLETED 76.35%

B. BRIEF DESCRIPTION OF TASKS PERFORMED THIS PERIOD

Contract 3 — Kajima working on final restoration and punch list items.

Final connections to be made after the RTB is in service.

Contract 4 – The 54" diameter sewer from CS-36 north to CS-39 located at Willow Lane and Midland Avenue has been completed. Remaining mainline work is the 36" diameter sewer connection between CS-9 and SAN-93 at Harmon Street and Woodward Avenue.

Pavement replacement and final restoration work has commenced.

Final connections to be made after the RTB is in service.

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

III. ISSUES AND UNANTICIPATED OCCURRENCES

INDENTIFY ISSUES AND UNANTICIPATED OCCURRENCES DURING THIS PERIOD AND PREVIOUS PERIODS

A. Current Period - Identify issue or unanticipated occurrences that either have a positive or negative impact on the completion of the project.

Contract 2 — On June 18, 1996, a 3" to 3.5" rain caused the Rouge River to reach a flood state resulting in the RTB and tunnel filling with water. The high water level at the RTB/Tunnel Chamber was recorded at elevation 716.7. The twenty-year and fifty-year flood stage elevations, at that location, are approximately 716.56 and 717.04, respectively.

No contract work has taken place this period, as the contractor has been pumping water, cleaning the Tunnel and repairing equipment damaged by the flood. Contract work is expected to resume in late July.

B. Previous Period - Briefly describe the resolution of previously reported issues and unanticipated occurrences, if applicable.

"None"

Appendix B

Excerpt from Detroit Free Press, July 30, 1996

EPA chief praises Rouge River cleanup
By Dan Shine
Free Press Staff Writer

The Rouge is looking rosy, but hold off on any fishing or swimming excursion for now.

The head of the Environmental Protection Agency came to town Monday to be updated on the cleanup of the Rouge River and praised the progress made in restoring one of the country's most polluted waterways.

"This is something I've wanted to see for a long time," EPA Administrator Carol Browner said at Henry Ford's estate on the University of Michigan-Dearborn campus. "There is widespread involvement of local governments, neighborhoods and children. Perhaps we can learn something here to use in other communities."

Browner was invited to town by U.S. Rep. John Dingell, D-Dearborn, who assembled environmentalists, educators and local officials to brief the EPA chief on the cleanup efforts. Browner also toured a combined sewer overflow retention basin under construction in Dearborn Heights and met with elementary and high school students who are studying water samples from the river.

A big part of the problem, Dingell said, is antiquated water treatment systems. The EPA, with state, county and local governments, is building combined sewer overflow basins and studying ways to keep pollutants from construction sites, yards, farms and city streets in the 438 square miles that make up the river's watershed from washing into the Rouge after heavy rains.

A local citizens group, the Friends of the Rouge, has organized annual river cleanups, started a student environmental education program and initiated an "adopt-a-stream" program. And a Barney-like dinosaur called SnoopAsaurus instructs kids how to keep their homes and yards "river friendly."

Jim Graham, executive director of Friends of the Rouge, said the work will make a dramatic difference in the river's cleanliness.

"It won't clean up everything but will make it better than it has been," he said. "And it's not just one agency or one group trying to do it all. We're making a lot of positive progress."

Fish population has expanded in the past few years and canoeing is allowed on parts of the Rouge. But neither Browner nor Dingell would predict when the river would be safe for fishing and swimming.

Browner said eliminating the pollution in the river "is not something done overnight. Remember where we started."

She said in the past, some communities have not been willing to combine efforts to clean rivers. That is not the case along the Rouge, Browner said.

"What I saw today is a community that knows it made the right decision," she said. "We know today what it takes to solve this problem. It takes all of us."

Supreme Court, U.S.
FILED
AUG 12 1996
CLERK

(3)

No. 96-56

In The Supreme Court of the United States

October Term, 1995

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMS, DIRECTOR; OAKLAND COUNTY DRAIN COMMISSION, GEORGE W. KUHN, COMMISSIONER; CHAPTER 20 BIRMINGHAM SEWER OVERFLOW DRAIN BOARD, GEORGE W. KUHN, CHAIRMAN; CITY OF BIRMINGHAM, THOMAS M. MARKUS, CITY MANAGER

Respondents.

RESPONDENT CITY OF BIRMINGHAM'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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28 pp

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in ruling that the FONSI (finding of no significant impact) based on the Michigan Department of Natural Resources' Environmental Assessment satisfied the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331 et seq.

II.

Whether the Court of Appeals erred in ruling that Petitioner, PURE WATERS, INC., failed to present a prima facia case that the construction of the sewage retention basin is likely to pollute, impair or destroy the air, water or other natural resources of Michigan in violation of Michigan Environmental Protection Act ("MEPA"), MCL §691.1201 et seq.

III.

Whether the Court of Appeals was correct in not considering the National Pollution Discharge Elimination System ("NPDES") permit's monitoring of the Rouge River and implementation of additional controls, if necessary, as an improper segmentation under NEPA.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. *Nature of the Case*	1
B. *Proceedings in the District Court*	2
C. *Decision in the District Court*	3
D. *Proceedings in the Court of Appeals*	4
PETITIONER'S MISSTATEMENTS OF FACT AND LAW	5
A. *Petitioner's Question No. 1 is Misleading*	5
B. *Petitioner's Statement of the Case is Misleading and Defective*	5
SUMMARY OF ARGUMENT	6
1. *NEPA Issue*	6
2. *MEPA Issue*	6
3. *Segmentation Issue*	6
ARGUMENT	7
I. THE ENVIRONMENTAL ASSESSMENT AND FONSI SATISFIED THE PROCEDURAL REQUIREMENTS OF NEPA	7
II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MEPA WAS NOT VIOLATED BECAUSE THE LEVEL OF IMPAIRMENT WAS NOT MET IN ORDER TO JUSTIFY JUDICIAL INTERVENTION	11
III. THERE WAS NOT AN IMPROPER SEGMENTATION OF THE PROJECT UNDER NEPA	12
CONCLUSION	14

INDEX OF AUTHORITIES

CASES	PAGE(S)
Catron v U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996)	9
City of Portage v Kalamazoo County Road Commission, 136 Mich App 276, 281; 355 N.W.2d 913 (1984)	12
Cronin v U.S. Department of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990)	8
Dafter Sanitary Landfill v Department of Natural Resources, 198 Mich App 499, 503-504; 499 N.W.2d 383 (1993)	12
Dickman v City of Santa Fe, 724 F.Supp. 1341, 1345 (D. N.M. 1989)	13
Environmental Defense Fund v Marsh, 651 F.2d 983 (5th Cir. 1981)	9, 10
Friends of Fiery Gizard v Farmer's Home Administration, 61 F.3d 501, 504-505 (6th Cir. 1995)	9, 10
Hanly v Kleindienst, 471 F.2d 823 (2nd Cir. 1972), cert denied, 412 U.S. 908; 93 S.Ct. 2290 (1973)	8
Hiram Clark Civic Club, Inc. v Lynn, 476 F.2d 421 (5th Cir. 1973)	10
Kent Road Commission v Hunting, 170 Mich App 222, 233; 428 N.W.2d 353 (1988)	11
Michigan United Conservation Clubs v Anthony, 90 Mich App 99, 105; 280 N.W.2d 83 (1978)	11
Pacific Legal Foundation v Andrus, 657 F.2d 829 (6th Cir. 1981)	11

	PAGE(S)
Park County Resource Council, Inc. v U.S. Department of Agriculture, 817 F.2d 609, 622 (10th Cir. 1987)	13
Preservation Coalition, Inc. v Pierce, 667 F.2d 851, 855 (9th Cir. 1982)	9
Robertson v Methow Valley Citizen's Council, 490 U.S. 332, 348; 109 S.Ct. 1835 (1989)	7
Stryker's Bay Neighborhood Council, Inc. v Karlen, 444 U.S. 223, 227; 100 S.Ct. 497, 500 (1980)	9
U.S. v South Florida Water Management District, 847 F.Supp. 1567 (S.D. FL. 1982), affirmed in part, reversed in part, and remanded on other grounds, 28 F.3d 1563 (11th Cir. 1994), cert denied __ U.S. __, 115 S.Ct. 1956	10, 11
STATUTES	
16 U.S.C. §1531-44	9
33 U.S.C. §1251 et seq.	1
42 U.S.C. §4331, et seq.	1
42 U.S.C. §4332(C)	3, 7
MCL §691.1201, et seq	1
REGULATIONS	
40 C.F.R. §1501.4(c), (e)	7

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, PURE WATERS, INC. ("Pure Waters"), is seeking declaratory and injunctive relief against Respondents, including the CITY OF BIRMINGHAM ("Birmingham"). Petitioner alleges that Respondent, MICHIGAN DEPARTMENT OF NATURAL RESOURCES' ("MDNR"), issuance of a finding of no significant impact ("FONSI") concerning the construction of a combined sewer overflow retention treatment basin in Linden Park in Birmingham, Michigan, was a violation of both the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331, et seq. and the Michigan Environmental Policy Act ("MEPA"), MCL §691.1201, et seq. This claim is made despite MDNR's detailed preparation of an environmental assessment ("EA"), Birmingham's appointment of a citizen's committee to hold public hearings and the consideration of several project alternatives, environmental impacts, benefits and costs.

Birmingham selected, and MDNR approved, a combined sewer overflow retention treatment basin in Linden Park so that combined sewer overflow ("CSO") would be controlled and the discharge of raw sewage into the Rouge River would be eliminated, thereby improving the public health and safety[1]. A national pollution discharge elimination system ("NPDES") permit required Birmingham to control its CSOs. The permit established three (3) phases for the irradication of the damage to the Rouge River caused by untreated sewage. The first stage was for Birmingham

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[1] As a result of litigation commenced in the Federal District Court for the Eastern District of Michigan in 1977 by the Environmental Protection Agency under the Clean Water Act, 33 U.S.C. §1251 et seq., against the communities that made up the Rouge River watershed in southeastern Michigan, a consent judgment was entered where it was resolved that all waste waters flowing into the Rouge River would be given primary and secondary treatment. This was to be accomplished in two stages. The first stage was to handle dry water conditions, including combined sewer overflows and the second stage was to address what weather conditions, including combined sewer overflows. The first stage has been completed and the Linden Park combined sewer overflow retention treatment basin is designed to address combined sewer overflows in "wet weather" conditions.

to operate, repair and maintain it existing facilities to minimize discharge; the second stage required that CSOs be controlled to eliminate the discharge of raw sewage by the year 2005. The third phase requires that additional controls be applied, if necessary, to comply with water quality standards at times of discharge. The combined sewer overflow retention treatment basin in Linden Park will satisfy phase two of the NPDES permit. Whether any additional controls will be necessary, is speculative but will be monitored by Respondents once the project is complete so that all water quality standards will eventually be met.

Several alternatives for the combined sewer overflow program were studied, including separated sewers which Petitioner favors, and after numerous public hearings, Birmingham decided construction of a combined sewer overflow retention treatment basin was the most cost effective, least intrusive alternative and identified Linden Park as the location. As a result of this decision by Birmingham and MDNR's completion of its EA and issuance of its FONSI, bonds for the financing of the project were issued and sold and construction began in December of 1994[2].

B. Proceedings in the District Court

On September 13, 1993, Citizens to Put the Issue on the Ballot, the predecessor to Pure Waters, filed its Notice of Intent to Sue under the Clean Water Act. Pure Waters waited until December 6, 1994, after financing was secured and construction of the Linden Park retention basin had begun, to file its Amended Complaint for Declaratory and Injunctive Relief against Respondents (R.2). On December 13, 1994, Pure Waters filed, and on December 15, 1994, argued, before the Honorable John Feikens, District Court Judge for the Eastern District of Michigan, that a temporary restraining order should be issued enjoining Respondents from proceeding with their construction of the Linden Park combined sewer overflow retention treatment basin until the Court could hear Pure Waters' Motion for Preliminary

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[2] As of July 19 1996, construction of the combined sewer overflow retention treatment basin is 76% complete. The project's cumulative cost as of July 19, 1996 is $20,244,194.60. June 20, 1996-July 19, 1996 Rouge River National Wet Weather Demonstration Project Monthly Construction Status Report.

Injunction (R.8). The District Court noted that the construction of the combined sewer overflow retention treatment basin was in accordance with an NPDES permit which was issued on October 19, 1989, revised on August 20, 1992, and that the permit applied to combined sewer overflow discharges (R.14). The District Court further noted that the Rouge River in southeastern Michigan is extremely polluted and that the combined sewer overflow program was developed to enact the goals of a Rouge River Remedial Action Plan ("Rouge R.A.P."), the goal being the protection of the public health by the elimination of raw sewage discharges into the Rouge River. The District Court issued a corrected Opinion and Order denying temporary restraint and certification on December 23, 1994 (R.19). Pure Waters filed a Notice of Appeal on December 16, 1994 (R.11).

The Sixth Circuit Court of Appeals dismissed Pure Waters' appeal, sua sponte, for lack of jurisdiction on January 19, 1995 (R.29). Pure Waters renewed its Motion for Preliminary Injunction on January 24, 1995 (R.27) and an evidentiary hearing was held on March 22–24, 1995.

C. Decision in the District Court

The District Court found that Birmingham will violate state and federal laws and be subject to significant penalties if it fails to comply with its NPDES permit. After listening to the testimony and reviewing the briefs filed, the District Court held that MDNR prepared an EA which met all of the requirements of NEPA, 42 U.S.C. §4332(C) and, after providing an opportunity for public comment, issued a FONSI (R.63, p.13). The District Court held that this action complied with the procedural mandates of NEPA (R.63, p.13).

After examining Pure Waters' MEPA claim, the District Court held that the construction of the Linden Park combined sewer overflow retention treatment basin will drastically improve the quality of the water in the Rouge River and that any "minimal" adverse affect of the combined sewer overflow retention treatment basin is greatly outweighed by the obvious benefits of the combined sewer overflow retention treatment basin (R.63, p.14). The District Court found no evidence that the Linden Park combined sewer

overflow retention treatment basin will "impair" the environment. The District Court was persuaded that the Respondents had, indeed, considered the potential problems with the Linden Park combined sewer overflow retention treatment basin and concluded that the Respondents had incorporated into their construction project protections for the environment to minimize any negative impacts which might possibly result. The District Court also noted that the project provided for monitoring of water quality after construction. The District Court recognized that the Rouge River did not presently meet water quality standards, and could not immediately achieve water quality standards irrespective of what action plan was adopted. The District Court held that Pure Waters had failed to establish a prima facie case of "impairment" under MEPA.

D. Proceedings in the Court of Appeals

Petitioner appealed the District Court's April 21, 1995 Opinion and Order Denying Plaintiff's Request for an Injunction. The Court of Appeals affirmed the District Court's findings that MDNR had complied with the procedural mandates of NEPA and Petitioner had failed to establish a prima facia case of "impairment under MEPA". The Court of Appeals also found that the District Court's decision to decline to grant Petitioner's request for an injunction was proper.

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

A. Petitioner's Question No. 1 is Misleading

Petitioner's statement of question number 1 is inaccurate and misleading:

> Whether a court may rule, as a matter of law, that a project's significant impacts are all beneficial and therefore, no further NEPA evaluation is required, an issue in which the courts of appeals are in conflict? (Petition, p.i)

Petitioner's question suggests that the issue is whether NEPA evaluation is required if a project's impacts are all beneficial. However, both the District Court and the Court of Appeals noted that the purpose behind NEPA is to insure that agencies consider the environmental impact of their decisions and take a "hard look" at the environmental effects of a planned project. The question is, rather, whether the agency's decision after an environmental assessment, FONSI, and decision to not issue an environmental impact statement, in a project designed solely to benefit the environment with no significant adverse effects, is arbitrary, capricious or an abuse of discretion.

B. Petitioner's Statement of the Case is Misleading and Defective

Petitioner states "that from the very beginning, the proposed project was conceded as inadequate to meet state or federal water quality requirements." (Petition, p.4) This is inaccurate. Despite passing references to the significant pollution currently existing in the Rouge River watershed system, Petitioner does not want to acknowledge the pollution when looking at the project selected by Respondents to deal with combined sewer overflow. This pollution cannot be ignored. Then Rouge River is not a pristine river. It is one of the most polluted rivers in the country. Birmingham was required to address combined sewer overflow discharges. The Linden Park retention treatment basin corrects this problem and will be monitored, as provided in Birmingham's NPDES permit, so that eventual water quality standards are obtained.

SUMMARY OF ARGUMENT

1. NEPA Issue

NEPA is designed to prevent environmental degradation. It requires that environmental problems created by a federal project be considered before the project is undertaken. MDNR's environmental assessment and FONSI recognized the possible environmental concerns of the project and determined that the benefits to the environment do not warrant the time and expense of preparing an environmental impact statement. The District Court and the Court of Appeals correctly determined that Respondents had complied with the procedural requirements of NEPA and that the FONSI was not arbitrary and capricious.

2. MEPA Issue

MEPA provides relief when a plaintiff has made a prima facia showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources. The District Court and Court of Appeals correctly determined that Respondents' combined sewer overflow retention treatment basin would not impair the environment.

3. Segmentation Issue

In reviewing the NPDES permit's phased approach, the Court of Appeals was correct in declining to find an improper segmentation of a project under NEPA.

ARGUMENT

I. THE ENVIRONMENTAL ASSESSMENT AND FONSI SATISFIED THE PROCEDURAL REQUIREMENTS OF NEPA

Contrary to Petitioner's suggestion, their real objection is not NEPA's application but the particular results chosen by Respondents. The Court of Appeals affirmed the District Court's opinion and order that Respondents had complied with NEPA.

> NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.

Robertson v Methow Valley Citizen's Council, 490 U.S. 332, 348; 109 S.Ct. 1835 (1989). An agency must determine whether an EIS is necessary after preparing an environmental assessment and issue a FONSI if the agency decides not to prepare an EIS. 40 C.F.R. §1501.4(c), (e). MDNR prepared an environmental assessment that met all requirements of 42 U.S.C. §4332(C) and issued a FONSI.

In 1989, the Michigan Water Resources Commission issued a NPDES permit to Birmingham that required the control of its combined sewer overflows by 1997. The permit established three phases for the correction of the problem of untreated sewage flowing into the Rouge River. In the first stage, Birmingham would operate, repair and maintain its existing facilities to minimize combined sewer overflow discharges. The second stage required that combined sewer overflow controls be implemented to eliminate the discharge of untreated overflows for the protection of the public health. Stage three required that the combined sewer overflow controls be evaluated and that further controls, if necessary, be implemented to meet water quality standards.

Birmingham appointed a citizen's committed to study Birmingham's compliance with the NPDES permit. Public hearings were held, engineers were hired to study several areas of

alternatives and identify economic and environmental impacts of the various alternatives. After several months of study, Birmingham identified the Linden Park combined sewer overflow retention treatment basin as the best method for Birmingham's compliance with the NPDES permit[3]. At the same time, MDNR was studying the Rouge problem, and reviewing Birmingham's project proposal. MDNR concluded that Linden Park combined sewer overflow retention treatment basin would remove from the Rouge River over 180 million gallons of untreated raw sewage and prevent all untreated sewage from entering the Rouge River. (R.61, pg. 79-83.) Against this benefit, MDNR recognized that some treated CSO might be introduced the Rouge River during severe storm conditions. This treated combined sewer overflow would receive primary treatment of skimming, settling and disinfectant prior to being introduced into the Rouge River. The disinfectant was to be sodium hypochlorite (a 5% chlorine solution). The annual amount of disinfectant which may be released into the Rouge River is 860 gallons (R.61, p.192).

In May of 1994, MDNR completed an environmental assessment of the Birmingham project proposal and, after an opportunity for public comment, issued its FONSI. The environmental assessment has been described as a "rough cut, low budget environmental impact statement." *Cronin v U.S. Department of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990). The environmental assessment is an established part of NEPA environmental review. *Hanly v Kleindienst*, 471 F.2d 823 (2nd Cir. 1972), cert denied, 412 U.S. 908; 93 S.Ct. 2290 (1973).

In looking at Respondents' environmental assessment, it is clear that they took the pollution of the Rouge River very seriously and spend considerable time and energy studying the impacts, costs, and benefits of the various proposals. Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure the agency has considered the

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[3] Birmingham's citizen's committee originally selected a different method of utilizing the retention basin technology which MDNR rejected because it was not cost-effective. Pure Waters' representatives participated in the citizen's committee hearings and sewer separation was considered and rejected.

environmental consequences. *Strycker's Bay Neighborhood Council, Inc. v Karlen*, 444 U.S. 223, 227; 100 S.Ct. 497, 500 (1980). As stated in *Friends of Fiery Gizzard v Farmers Home Administration*, 61 F.3d 501, 504-505 (6th Cir. 1995), "If the agency reasonably concludes, on the basis of the environmental assessment, that the project will have no significant adverse environmental consequences, the environmental impact statement is not required."

The expenditure of funds on a project that clearly improves the quality of the human environment does not make sense and is not necessary where an agency reasonably concludes on the basis of the environmental assessment "that the project will have no significant adverse environmental consequences". In this event, an environmental impact statement is not required. *Preservation Coalition, Inc. v Pierce*, 667 F.2d 851, 855 (9th Cir. 1982).

Petitioner's reliance on *Catron v U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996) is misplaced. In that case, the secretary of the U.S. Fish and Wildlife Service determined that he was not required to comply with the documentation requirements of NEPA claiming an exemption existed under the Endangered Species Act, 16 U.S.C. §1531-44, as a matter of law. *Id.* at 1432. The District Court granted Catron County's motion for partial summary judgment finding that the secretary had failed to comply with NEPA. *Catron* is completely different than the present situation. Here, MDNR acknowledges NEPA's application and complied with its requirements.

Petitioner's argument is not strengthened by its reference to *Environmental Defense Fund v Marsh*, 651 F.2d 983 (5th Cir. 1981). In that case, an EIS was prepared by the Army Corps of Engineers for the construction of the Tennessee-Tombigbee Water Way. Subsequent to the EIS, there were major, significant substantial design changes, tripling the cost of the project, increasing the land needed by 50% (35,000 acres), flooding and waterlogging an additional 55,000 acres and increasing the amount of ground spoil to be removed by 9 million cubic yards. It was

clear that the changes had a "significant adverse impact" on the environment. The focus of that case, as opposed to the present situation, was not on a project designed solely to benefit the environment.

Interestingly, both *Environmental Defense Fund v Marsh*, 651 F.2d 983 (5th Cir. 1981) and *U.S. v South Florida Water Management District*, 847 F.Supp. 1567 (S.D. FL. 1982), affirmed in part, reversed in part, and remanded on other grounds, 28 F.3d 1563 (11th Cir. 1994), cert denied __ U.S. __, 115 S.Ct. 1956, which were referenced by Petitioner rely on *Hiram Clark Civic Club, Inc. v Lynn*, 476 F.2d 421 (5th Cir. 1973) which, in dicta, references the need for an EIS for significant beneficial impacts.

Hiram Clark is outdated, only dicta, and did not focus on the consequences of requiring an EIS where the only impact was beneficial. The Sixth Circuit Court of Appeals in *Friends of Fiery Gizzard v Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995), was cognizant of the costs involved in preparing an environmental impact statement. In that project, the environmental assessment forecast a purely beneficial impact on the living environment. The Court of Appeals noted that the purpose of NEPA was to ensure that the environmental impact of federal actions was considered. With that in mind, the court of appeals stated that if the agency reasonably concludes on the basis of the environmental assessment, "that the project will have no significant adverse environmental consequences," an environmental impact statement is not required. The Court of Appeals noted that in the years since that 1973 case, there has been "a growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially." *Id.* at 505, citing *River Road Alliance, Inc. v Corps of Engineers of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985).

MDNR conducted a detailed environmental assessment study of the project and determined that there would be no significant adverse effects on the environment. The very purpose of the project is to improve the environment and the record indicates

that the project will substantially reduce pollution to the Rouge River and that there are no significant adverse effects on the human environment by the combined sewer overflow retention treatment basin. Noting NEPA's original purpose was to promote preservation and enhancement in the environment, courts have noted the irony of the use of NEPA as a device to frustrate actions intended to benefit the environment. *U.S. v South Florida Water Management District*, 847 F.Supp. 1567, 1580 (S.D. Fla 1992), Aff'd in part, rev'd in part and remanded on other grounds, 28 F.3d 1563 (11 Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1956, 131 L.Ed.2d; *Pacific Legal Foundation v Andrus*, 657 F.2d 829 (6th Cir. 1981).

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MEPA WAS NOT VIOLATED BECAUSE THE LEVEL OF IMPAIRMENT WAS NOT MET IN ORDER TO JUSTIFY JUDICIAL INTERVENTION

The Michigan Court of Appeals has identified what is necessary for the plaintiff to establish a prima facia case of a MEPA violation: (1) whether a natural resource is involved; and (2) whether the impact of the activity on the environment rises to the level of ***impairment***. *Kent Road Commission v Hunting*, 170 Mich App 222, 233; 428 N.W.2d 353 (1988). The District Court, affirmed by the Court of Appeals, determined that plaintiff's MEPA claim is without merit. Petitioner claims that the construction of the Linden Park combined sewer overflow retention treatment basin will impair the environment. What does it mean to impair the natural resources of the air or the water? In *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105; 280 N.W.2d 883 (1978), the court cited *Ray v Mason*, 393 Mich 294, 306; 224 N.W.2d 883 (1975) as providing the MEPA standard of review and defined the word "impair" citing from Black's Law Dictionary as follows:

> To weaken, to make worse, to lessen, empower, diminish, or relax, or otherwise effect in an injurious way.

Construction of the Linden Park combined sewer overflow retention treatment basin will dramatically improve the quality of

the waters in the Rouge River. From an average of 220 million gallons per year of combined sewage being dumped into the Rouge River, the Linden Park combined sewer overflow retention treatment basin will reduce this number to approximately 43 million gallons per year. Additionally, the portion that still may be discharged into the Rouge River will be skimmed, settled and disinfected so that the outflow will be significantly cleaner than combined sewer outflow currently being discharged. In *City of Portage v Kalamazoo County Road Commission*, 136 Mich App 276, 281; 355 N.W.2d 913 (1984), a Michigan Court of Appeals indicated that "a court is not empowered to enjoin any conduct which does not rise to the level of an environmental risk prescribed by MEPA. Citing *Committee for Sensible Land Use v Garfield Township*, 124 Mich App 559, 564 (1983).

Dafter Sanitary Landfill v Department of Natural Resources, 198 Mich App 499, 503-504; 499 N.W.2d 383 (1993), set forth the threshold test for courts to utilize and determine whether the impact of a proposed action is so significant as to constitute an environmental risk and require judicial intervention. In applying the *Dafter* criteria, it is clear that Petitioner failed to show that the combined sewage overflow retention treatment basin rises to the level of impairment contemplated under MEPA. The environmental analysis performed by MDNR identified specific steps that would minimize environmental impact and the District Court correctly applied MEPA in determining that Plaintiff had failed to establish a prima facia case. Petitioner erroneously claims that the sole purpose of the project was to meet water quality standards. The federal action and consent judgment entered in the District Court mandated that Birmingham address the combined sewer overflow problem in the Rouge River. Birmingham has met that goal. MEPA was correctly reviewed by the District Court and the claim was without merit.

III. THERE WAS NOT AN IMPROPER SEGMENTATION OF THE PROJECT UNDER NEPA.

The NPDES permit issued to Birmingham recognized that complete and instantaneous elimination of pollution of the Rouge River was not feasible. Birmingham and MDNR studied several

possible alternatives to address combined sewer overflows evaluating the benefits, costs and impacts of each alternative.

Petitioner claims that the NPDES permit was an improper segmentation of the project. This is incorrect. A result of the prior lawsuit and consent judgment of the River Rouge communities, the focus of the project was to eliminate combined sewer overflow as opposed to all water quality standards. The concept of segmentation is to divide a large or cumulative project into smaller components in order to avoid designating the project a major federal action. This has been held to be unlawful. *Park County Resource Council, Inc. v U.S. Department of Agriculture*, 817 F.2d 609, 622 (10th Cir. 1987). Generally, segmentation is claimed in highway projects which are artificially divided into smaller, less significant actions to avoid NEPA's requirements. *Dickman v City of Santa Fe*, 724 F.Supp. 1341, 1345 (D. N.M. 1989).

Petitioner mischaracterizes the purpose of the combined sewer overflow retention treatment basin. While the attainment of water quality standards is clearly the goal, the project's focus is the elimination of raw sewage discharges into the Rouge River. Segmentation did not occur in this case. The environmental assessment noted that the eventual goal was to meet water quality standards.

Petitioner claims this delay in studying and meeting water quality standards is unreasonable, unpermissible and equates to segmentation. Petitioner claims that if Respondents had considered the possible future costs of meeting water quality standards (notwithstanding the degree of speculation needed would render such an exercise essentially meaningless), Birmingham would have elected separated sewers as the project. Petitioner wants to focus on the goal of a pristine river and ignore the facts that the Rouge is one of the most polluted rivers in the nation and that destruction of thousands of trees, tearing up 80% of the roads, higher costs and disturbing private property are all legitimate factors which Respondents looked at, in addition to water quality, in deciding to construct the combined sewer overflow retention treatment basin. There was no artificial segmentation in this case.

The analysis of the environmental impacts of the project and study of the alternatives was done with an open mind and without any preordained decision as to a project plan. Petitioner's claim that Respondents attempted some type of post-hoc compliance with NEPA is simply not true. The environmental consequences of the various projects were considered and a project was selected. There was no improper segmentation in addressing the goal of compliance with water quality standards until after a study of how the combined sewer overflow retention treatment basin had improved the Rouge River by its elimination of raw sewage discharges.

CONCLUSION

In conclusion, for the foregoing reasons, Birmingham respectfully requests that this Petition For a Writ of Certiorari be denied.

Respectfully submitted,

BEIER HOWLETT, P.C.

By: _____

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Timothy J. Currier (P28939)
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Dated: August 9, 1996

No. 95-2054

In The Supreme Court of the United States

PURE WATERS, INC.

Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMS, DIRECTOR; OAKLAND COUNTY DRAIN COMMISSION, GEORGE W. KUHN, COMMISSIONER; CHAPTER 20 BIRMINGHAM SEWER OVERFLOW DRAIN BOARD, GEORGE W. KUHN, CHAIRMAN; CITY OF BIRMINGHAM, THOMAS M. MARKUS, CITY MANAGER

Respondents.

APPENDIX

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APPENDIX
Table of Contents

Page

Appendix A

Rouge River National Wet Weather Demonstration Project Monthly Construction Status Report..... 1a

Appendix B

Excerpt from Detroit Free Press, July 30, 1996 ..... 7a

Appendix A

Rouge River National Wet Weather Demonstration Project
Monthly Construction Status Report

ROUGE RIVER NATIONAL WET WEATHER DEMONSTRATION PROJECT

MONTHLY CONSTRUCTION STATUS REPORT

SUBGRANTEE: Oakland County Drain Commissioner
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

This report is due on the 20th day of the month following the reporting period.

I. FINANCIAL DATA

	Cumulative Amount	% of Total $ Budget
A. CONTRACT(S) AMOUNT	$26,252,062.00	100.00
B. NET CHANGE BY WORK ORDERS	$ 263,197.47	1.00%
C. CONTRACT(S) AMOUNT TO DATE	$26,515,259.47	101.00%
D. PROJECT CUMULATIVE COST TO DATE	$20,244,194.60	76.35%
E. BALANCE REMAINING	$ 6,266,064.87	23.48%

DATE SUBMITTED: July 19,1996

CONTACT PERSON: Philip Sanzica, P.E.

ADDRESS: One Public Works Drive
Waterford, Michigan 48238

TELEPHONE NUMBER: 810-858-1031

SIGNED: /s/ Philip Sanzica
Subgrantee's Representative

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

II. ACTIVITIES REPORTING

A. ESTIMATED % OF TOTAL CONSTRUCTION COMPLETED 76.35%

B. BRIEF DESCRIPTION OF TASKS PERFORMED THIS PERIOD

Contract 1 — Basin construction has attain the following % complete in the various areas:

Walls -	87%	Baffle Beams —	75%
Columns -	84%	Precast Concrete —	70%

Control Building concrete is about 99% complete.

Mechanical piping and duct work installation in the Control Building has stopped due to the recent flooding. Miscellaneous utility piping is being installed now.

Electrical work in the Control Building is concentrating running conduit and installing panels not affected by the flooding.

Structural backfill is about 80% complete.

Work on outfall structure is about 85% compete.

Influent structure and influent conduits are about 65% complete.

(continued)

Contract 2 – On June 18, 1996, a 3" to 3.5" rain caused the Rouge River to reach a flood state resulting in the RTB and tunnel filling with water. The high water level at the RTB/Tunnel Chamber was recorded at elevation 716.7. The twenty-year and fifty-year flood stage elevations, at that location, are approximately 716.56 and 717.04, respectively.

No contract work has taken place this period, as the contractor has been pumping water, cleaning the Tunnel and repairing equipment damaged by the flood. Contract work is expected to resume in late July.

(continued)

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

II. ACTIVITIES REPORTING

A. ESTIMATED % OF TOTAL CONSTRUCTION COMPLETED 76.35%

B. BRIEF DESCRIPTION OF TASKS PERFORMED THIS PERIOD

Contract 3 — Kajima working on final restoration and punch list items.

Final connections to be made after the RTB is in service.

Contract 4 – The 54" diameter sewer from CS-36 north to CS-39 located at Willow Lane and Midland Avenue has been completed. Remaining mainline work is the 36" diameter sewer connection between CS-9 and SAN-93 at Harmon Street and Woodward Avenue.

Pavement replacement and final restoration work has commenced.

Final connections to be made after the RTB is in service.

MONTHLY CONSTRUCTION STATUS REPORT
(Continued)
Birmingham CSO Drain

PERIOD OF: June 20, 1996 to July 19, 1996

III. ISSUES AND UNANTICIPATED OCCURRENCES

INDENTIFY ISSUES AND UNANTICIPATED OCCURRENCES DURING THIS PERIOD AND PREVIOUS PERIODS

A. Current Period - Identify issue or unanticipated occurrences that either have a positive or negative impact on the completion of the project.

Contract 2 — On June 18, 1996, a 3" to 3.5" rain caused the Rouge River to reach a flood state resulting in the RTB and tunnel filling with water. The high water level at the RTB/Tunnel Chamber was recorded at elevation 716.7. The twenty-year and fifty-year flood stage elevations, at that location, are approximately 716.56 and 717.04, respectively.

No contract work has taken place this period, as the contractor has been pumping water, cleaning the Tunnel and repairing equipment damaged by the flood. Contract work is expected to resume in late July.

B. Previous Period - Briefly describe the resolution of previously reported issues and unanticipated occurrences, if applicable.

"None"

Appendix B

Excerpt from Detroit Free Press, July 30, 1996

EPA chief praises Rouge River cleanup
By Dan Shine
Free Press Staff Writer

The Rouge is looking rosy, but hold off on any fishing or swimming excursion for now.

The head of the Environmental Protection Agency came to town Monday to be updated on the cleanup of the Rouge River and praised the progress made in restoring one of the country's most polluted waterways.

"This is something I've wanted to see for a long time," EPA Administrator Carol Browner said at Henry Ford's estate on the University of Michigan-Dearborn campus. "There is widespread involvement of local governments, neighborhoods and children. Perhaps we can learn something here to use in other communities."

Browner was invited to town by U.S. Rep. John Dingell, D-Dearborn, who assembled environmentalists, educators and local officials to brief the EPA chief on the cleanup efforts. Browner also toured a combined sewer overflow retention basin under construction in Dearborn Heights and met with elementary and high school students who are studying water samples from the river.

A big part of the problem, Dingell said, is antiquated water treatment systems. The EPA, with state, county and local governments, is building combined sewer overflow basins and studying ways to keep pollutants from construction sites, yards, farms and city streets in the 438 square miles that make up the river's watershed from washing into the Rouge after heavy rains.

A local citizens group, the Friends of the Rouge, has organized annual river cleanups, started a student environmental education program and initiated an "adopt-a-stream" program. And a Barney-like dinosaur called SnoopAsaurus instructs kids how to keep their homes and yards "river friendly."

Jim Graham, executive director of Friends of the Rouge, said the work will make a dramatic difference in the river's cleanliness.

"It won't clean up everything but will make it better than it has been," he said. "And it's not just one agency or one group trying to do it all. We're making a lot of positive progress."

Fish population has expanded in the past few years and canoeing is allowed on parts of the Rouge. But neither Browner nor Dingell would predict when the river would be safe for fishing and swimming.

Browner said eliminating the pollution in the river "is not something done overnight. Remember where we started."

She said in the past, some communities have not been willing to combine efforts to clean rivers. That is not the case along the Rouge, Browner said.

"What I saw today is a community that knows it made the right decision," she said. "We know today what it takes to solve this problem. It takes all of us."

Supreme Court, U
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(4)

No. 96-56

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PURE WATERS, INC.
Petitioner

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
ET AL.,
Respondents

ON THE PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF AN AMICUS CURIAE, CARL J. MARLINGA, PROSECUTING ATTORNEY FOR MACOMB COUNTY MICHIGAN IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Carl J. Marlinga*
Prosecuting Attorney
40 North Main
Mt. Clemens, Michigan 48043

* Counsel of Record

23pp

QUESTIONS PRESENTED FOR REVIEW

The *amicus curiae* as prosecuting attorney for Macomb County, Michigan, submits this brief to request that this Court give close attention to issue number three (3) presented by petitioner Pure Waters, Inc.; i.e.:

"3. Whether a Federal Court that has exercised sole jurisdiction over all area combined sewer overflow projects erroneously interprets state law, and thereby usurps state authority, by ruling that any new project which improves existing environmental conditions, even though such project continues to pollute, is exempt from the Michigan Environmental Protection Act, which absolutely bars any project that pollutes the environment when a feasible nonpolluting alternative exists?"

From the standpoint of the interest of the amicus curiae, explained further on in this brief, the question can be better stated as the following three inter-related questions:

1. Whether the National Environmental Policy Act preempts the field of water quality and pollution control so as to prevent a state from enacting a statute establishing higher water quality standards?

2. Whether a federal district court's exercise of pendent jurisdiction has resulted in an improper *de facto* federal preemption of water quality and pollution control, thereby nullifying the Michigan Environmental Protection Act and depriving any potential Michigan plaintiff such as the *amicus,* herein, from bringing a lawsuit seeking relief under the state statute?

3. Whether, if this court does not grant a writ of certiorari, there is any procedural avenue for relief from an erroneous interpretation of the Michigan Environmental Protection Act, a question of state law, which is now beyond the reach of any state court to review, consider, or correct?

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT.....7

I. THIS COURT SHOULD CLEARLY STATE THAT STATE LAWS SETTING HIGHER STANDARDS FOR WATER QUALITY ARE NOT PREEMPTED BY FEDERAL STATUTES 7

II. THE DOCTRINE OF PENDENT JURISDICTION HAS BEEN MISUSED IN THIS CASE TO NULLIFY A STATE STATUTE AND PREVENT ACCESS TO A STATE COURT FORUM 9

CONCLUSION 10

EXHIBIT: NOTICE OF INTENTION TO SUE.....12

INDEX OF AUTHORITIES

CASES PAGE

County of Oakland v Berkley, 742 F.2d 289 (C.A.6, 1984) 9

Eyde v State of Michigan, 393 Mich. 453 (1975) 9

Her Majesty the Queen v City of Detroit, 874 F.2d 332 (C.A.6, 1989) 5, 7, 8

Metropolitan Life Insurance Co. v Taylor, 481 U.S. 58 (1987) 5, 7

Michigan State Highway Commission v Vanderkloot, 393 Mich. 159 (1974) 9

Ray v Mason City Drain Commissioner, 393 Mich. 294 (1975) 8, 9

Stoddard v Western Carolina Regional Sewer Authority, 784 F. 2d 1200 (C.A.4, 1986) 7

United States v State of Michigan, 777 F.Supp 1365 (E.D. Mich, 1991) 3

United States Steel Corp. v Train 556 F. 2d 822 (C.A.7, 1977) 7

STATUTES

33 U.S.C. 1251(a)(1) 2

42 U.S.C. 4331 7

M.C.L. 691.1201 ..... 1, 7

BRIEF OF AN AMICUS CURIAE, CARL J. MARLINGA, PROSECUTING ATTORNEY FOR MACOMB COUNTY MICHIGAN IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae*, Carl J. Marlinga is the elected prosecuting attorney for Macomb County, Michigan, and brings this *amicus curiae* brief (without seeking consent of the parties other than plaintiff/petitioner) under Rule 36.4 of the Rules of the Supreme Court of the United States.

Macomb County is a county of approximately 718,000 residents situated just north of Detroit. The eastern edge of Macomb County is the shoreline of Lake St. Clair, a smaller lake in the waters that comprise the Great Lakes system. Lake St. Clair receives waters from Lake Huron and discharges them into the Detroit River. The western edge of Macomb County is the border of Oakland County, the county that is home to the City of Birmingham whose sewage retention basin project is the subject of the lawsuit for which a writ of certiorari is now sought by Pure Waters, Inc. the plaintiff in this suit. Macomb County lies downstream from Oakland County and receives waters from Oakland County on their way to Lake St. Clair.

The geography recited above is important because it is the starting point in explaining the interest of the *amicus curiae.*

As the prosecuting attorney, the *amicus* is authorized under Michigan state law to bring nuisance abatement actions to enjoin any number of possible nuisances, including systematic discharges of pollutants into the waters of the county. As the prosecutor, the *amicus* also has standing under Michigan law to file suit to enjoin pollution of the waters under the Michigan Environmental Protection Act, M.C.L. 691.1201, M.S.A. 14.528(201).

Lastly, as the prosecutor and a representative of a political subdivision, the *amicus* has standing to bring suit to enforce the effluents standards of the Water Pollution Prevention and Control Act (also commonly referred to as the Clean Water Act), 33 U.S.C. 1251(a)(1) et seq.

On November, 30, 1995, the Macomb County Board of Commissioners, the elected governing board of the county, voted to authorize the *amicus* to file a Notice of Intention To Sue to be filed upon the United States Environmental Protection Agency and the Michigan Department of Environmental Quality alleging that those agencies had failed to perform their statutory duties to properly regulate the effluents being dumped into the waters of Macomb County from a combined sewer and waste water facility operated by Oakland County. The Notice of Intention To Sue was mailed December 4, 1995. A copy of the Notice is attached as an Exhibit. The actual filing of the suit has been delayed pending the issuance of a proposed new NPDES (National Pollution Discharge Elimination System) permit which the Michigan Department of Environmental Quality promises will soon be issued to address the problems cited in the Notice. Since this new proposed NPDES permit has not yet been issued, it is not certain that the new permit requirements will adequately address the pollution problem. Therefore, the *amicus* is prepared to go forward with the lawsuit. The success of that lawsuit, however, at least as to the counts relying upon Michigan law, is threatened by the holding of the District Court and the Court of Appeals in this, the Pure Waters case.

In the interest of accuracy and fairness it must be noted that the combined sewer overflow facility at issue in the proposed Macomb County lawsuit is not the same retention basin that is the subject of the Pure Waters suit. In fact the City of Birmingham's basin discharges its waters in a southernly route that empties into Wayne County and the Detroit River. The legal holdings with respect to the viability and enforcement of the Michigan Environmental Protection Act are, however, directly

on point and at issue in any lawsuit that would be filed to relieve the pollution discharges now plaguing Macomb County.

The legal conundrum is this: The District Court in an extraordinary assertion of jurisdiction issued an order directing that all cases which derive from "a common nucleus of operative facts" involving the "Detroit water pollution problem" in relation to sewage systems were to be filed or removed to be consolidated with the initial case dealing with this problem in the District Court. *United States v State of Michigan*, 777 F. Supp. 1365 (E.D. Mich, 1991). As a result of that order, the Pure Waters case was placed on the docket of the District Court, the Honorable John Feikens. If the *amicus* were to file his suit, whether in state or federal court, it, too, would be transferred or removed to Judge Feikens.

The District Court's decision, upheld by the Sixth Circuit Court of Appeals, is an incorrect interpretation of the federal statutes; but at least Pure Waters, Inc. had an opportunity to litigate the federal statutory issues in a federal forum. The summary and rather superficial (and wrong) analysis of the Michigan Environmental Protection Act engaged in by the District Court and affirmed by the Court of Appeals presents more troubling substantive and procedural errors. Under the doctrine of pendent jurisdiction a federal court may, indeed, determine related state claims, looking to state case precedent to intuit what the state's highest court would have decided.

In this case, however, the analysis of the state claim is sparse and the contemplation of state court precedent is minimal. Most importantly, if the District Court is in error, the error will continue to hold sway in a court system that is not particularly attuned to redressing errors in state substantive law issues. From the standpoint of the *amicus*, the filing of any suit premised upon the Michigan Environmental Protection Act is nearly futile. The claim cannot be heard in state court because of the District Court's previous consolidation order; and the District Court's

nullification of the Michigan Environmental Protection Act cannot be appealed to a Michigan appellate court.

The actions of the District Court and the Court of Appeals have as a practical matter preempted and repealed the Michigan Environmental Protection Act; and the *amicus,* and all others similarly situated, are without a forum to appeal that preemption and nullification, unless, of course, this Court issues its writ of certiorari.

The shame of this controversy is that these intellectually fascinating and novel points of jurisdiction, comity and preemption are being debated over a factual base that could not be more disgusting. Untreated or partially treated human waste is being discharged on heavy rain days over the weir of Oakland County's southern retention basin (the so-called Twelve Towns combined sewer overflow facility referred to in the Notice of Intention To Sue) into the waters of Macomb County. Residents living along the Red Run Drain and the Clinton River must deal regularly with an overwhelming stench coming off of those waterways. Beaches have been closed to swimming. A multi-million dollar water-recreation industry has been losing money for years. In 1994, when lake winds blew into shore for a sustained period of time, floating masses of seaweed blocked the normal flow of the Clinton River bottling up human waste, dead fish, and rotting vegetation along miles of residential and recreational shoreline of Lake St. Clair.

The residents of Macomb County through the office of the *amicus* need a fair forum to seek relief from these horrific conditions. They need to rely on a statute, passed by their legislature, imposing standards higher than those set in federal law. But without this Court's writ of certiorari that statute is now a dead letter.

SUMMARY OF ARGUMENT

This case is important because it concerns the well recognized national concern over water quality and pollution control. From the perspective of our state and national court systems this case has unintentionally and unexpectedly raised some of the most basic and vexing questions of federalism, pendent jurisdiction and the preemption doctrine.

A primary issue of national concern, on which state and federal courts need this Court's guidance, is the fundamental question of whether federal law preempts state law in the field of water quality and pollution control so as to prevent a state from enacting a statute establishing higher water quality standards.

Most legal scholars would say that preemption was neither intended nor desirable; and that states should be free to adopt and enforce higher standards. Indeed, in an earlier case, the Sixth Circuit Court of Appeals held that the very state statute at issue, the Michigan Environmental Protection Act ("MEPA") was not preempted by federal law. *Her Majesty the Queen v City of Detroit*, 874 F.2d 332 (C.A. 6, 1989). This court has also held that state claims are preempted by federal law only where there is a "clearly manifested" intent by Congress. *Metropolitan Life Insurance Co. v Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).

Yet the District Court contrived an analysis of MEPA which makes it impossible for the state law to act independently of the federal clean water statutes. The analysis is error enough, but the District Court (at A27 of Petitioner's Appendix) has this curious footnote:

> **In view of this finding the court notes nonetheless that a contention can be made that MEPA is preempted by federal laws which regulate water pollution.**

The Sixth Circuit Court of Appeals chose to not comment upon this footnote. The case law is, therefore, confused in an area of substantial importance. Either federal law preempts the field or it does not preempt. If this Court does not address the question, the preference for preemption will gain more ground in future cases. If that is the will of this Court, it should say so. If the Court is in agreement with the earlier decision of the Sixth Circuit in *Her Majesty the Queen*, supra., it should also say so to stop the drift toward preemption.

If this Court does not issue a writ of certiorari for the plaintiff in this case, Pure Waters, Inc., the *amicus* in the contemplated case against Oakland County, and all others similarly situated will forever be denied relief under MEPA. The holdings of the District Court and the Court of Appeals on a critical issue of state law are incorrect; but procedurally, because of the District Courts omnibus consolidation order (directing all Detroit area water and sewerage cases to be filed or removed to the District Court) the Michigan Court of Appeals and the Michigan Supreme Court will never have an opportunity to interpret and apply the Michigan statute. From the standpoint of the doctrines of comity and pendent jurisdiction no procedural result could be more bizarre. Through the exercise of pendent jurisdiction and case consolidation an erroneous interpretation of a Michigan statute is now forever beyond the reach of the Michigan court system to consider and correct.

In such unusual circumstances, with a national problem such as water quality at the heart of the controversy, it is quite necessary and appropriate for this Court to issue its writ of certiorari to reverse the procedural errors which have deprived the people of Michigan from the protection of a statute passed by their own legislature, but now nullified by the federal courts.

ARGUMENT

I. THIS COURT SHOULD CLEARLY STATE THAT STATE LAWS SETTING HIGHER STANDARDS FOR WATER QUALITY ARE NOT PREEMPTED BY FEDERAL STATUTES.

The case law on preemption of state law by federal statutes in the area of water quality is clear; preemption is not favored. In *Her Majesty The Queen v Cityof Detroit*, 874 F.2d 332 (C.A.6, 1989) the United States Court of Appeals for the Sixth Circuit held that a state statute, the Michigan Environmental Protection Act, M.C.L. 691.1201 et seq., (the very statute at issue in this case) was not preempted by federal law. In *Metropolitan Life Insurance Co. v Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed 2d 55 (1987) this court also held that state claims are preempted by federal law only where there is a "clearly manifested" intent by Congress. The United States Court of Appeals for the Fourth Circuit has held that nothing in the Clean Water Act indicates a congressional intent to occupy the entire field of water pollution to the exclusion of state regulation. *Stoddard v Western Carolina Regional Sewer Authority*, 784 F. 2d 1200 (C.A. 4, 1986). The Seventh Circuit has also opined that states are free to adopt and enforce higher water quality standards. *United States Steel Corp. v Train*, 556 F. 2d 822 (C.A. 7, 1977).

In spite of the holding in *Her Majesty The Queen*, supra, the District Court applied an analysis which had the practical effect of making MEPA a "piggy-back/me-too" statute; i.e. if the complained of activity or project satisfied the National Environmental Policy Act, 42 U.S.C. 4331 et seq., every effort would be made and was made to reach the same holding under the state MEPA statute. The distaste of the District Court for the state statute is self-evident in the rather facile, half-hearted analysis engaged in by the District Court at A25 through A27 (of the Petitioner's Appendix) regarding the MEPA cause of action. Under the Michigan MEPA statute, as interpreted by Michigan

courts, a polluter is not allowed to continue polluting unless no feasible and prudent alternative exists. *Ray v Mason City Drain Commissioner*, 393 Mich. 294, 224 N.W.2d 883 (1975). The state is obviously close to a zero tolerance standard.

The District Court erred substantially in its analysis by carrying over the less stringent federal statutory test. At A26 (of Petitioner's Appendix) the District Court says that because the proposed retention basin construction project will make things better (reducing overflow events from the order of forty to sixty times per year to approximately six to nine per year) it satisfies the Michigan statute. No Michigan court would so hold.

The District Court goes even further to show its preference for preemption in this footnote at A27:

> **In view of this finding the court notes nonetheless that a contention can be made that MEPA is preempted by federal laws which regulate water pollution.**

The District Court's error is only exceeded by its honesty and candor.

The District Court is asking for a nationwide preemption for federal law in this area. The Sixth Circuit Court of Appeals elected to not specifically address this issue, perhaps troubled by the inherent contradiction with its earlier holding in *Her Majesty The Queen*, supra.

The issue is now ripe for determination by this Court. Granting the writ of certiorari will settle the law on this important question.

II. THE DOCTRINE OF PENDENT JURISDICTION HAS BEEN MISUSED IN THIS CASE TO NULLIFY A STATE STATUTE AND PREVENT ACCESS TO A STATE COURT FORUM.

This closing section of the argument combines the second and third questions presented for review. These questions could be examined under separate argument headings, but the very nature of the procedural error and the substantial injustice at issue favors this combination. The District Court has created a vicious circle. First, it accepts the state MEPA claim under the doctrine of pendent jurisdiction. This is eminently appropriate. Second, it issues what can only be called an omnibus consolidation order directing that all cases which derive from "a common nucleus of operative facts" involving the "Detroit water pollution problem" shall be brought in the District Court or removed to the District Court (The order was entered in Case No. 77-71100, E.D. Mich, cited at 777 F.Supp 1365 (E.D. Mich, 1991) and was affirmed in *County of Oakland v City of Berkley,* 742 F.2d 289 (C.A.6, 1984). This consolidation order was and is extraordinary, but it seemed to have sufficient practical benefit to overcome the unease inherent in its broad and possible overreaching nature.

The previously unseen difficulty in the consolidation order only appears now that the District Court has erred, at least arguably, on the state law issue. As stated previously, Michigan has a near zero tolerance law on water quality. The *amicus* could, therefore, file a complaint in any state court of appropriate venue and could cite a wealth of state precedent to support the argument that a polluter must clean up its pollution unless no feasible and prudent alternative exists. *Ray v Mason,* 393 Mich. 294, 224 N.W.2d 883 (1975); *Eyde v State of Michigan*, 393 Mich. 453, 225 N.W.2d 1 (1975); *Michigan State Highway Commission v Vanderkloot,* 393 Mich. 159, 220 N.W.2d 416 (1974).

The standard, seemingly preferred by the District Court, and left undisturbed by the Sixth Circuit, that projects which improve preexisting conditions are sufficient to satisfy MEPA, would not be seriously received in the Michigan courts.

The problem now facing the *amicus,* however, is truly insoluble. Any complaint filed in state court will be removed to the District Court. There the law of the case will, in effect, nullify any meaningful application of MEPA. The worst practical effect, however, is the inability to appeal the MEPA ruling to any forum. The District Court has already ruled. The Sixth Circuit has affirmed the error. If this court does not grant review, the Michigan MEPA law will, in effect, have been repealed. The amicus and all others similarly situated will have only federal law to rely on.

Normally federal statutes offer a great deal of relief. But, if, as is the case here, a state statute was intended to provide additional protections, and if, as is the case here, the state statute is effectively preempted by federal law, this court's writ of certiorari is essential to correct the injustice.

CONCLUSION

The petition of Pure Waters, Inc., for writ of certiorari should be granted.

Respectfully submitted,

Carl J. Marlinga*
Macomb County Prosecuting Attorney
Macomb County Court Building
40 N. Main, 6th Floor
Mt. Clemens, Michigan 48043
Phone: (810) 469-5641

* Counsel of Record

EXHIBIT

(The Notice of Intention To Sue, reproduced on the following pages, is a precondition to bringing suit against the Environmental Protection Agency or any State Agency which is delegated by the EPA to perform regulatory functions. It is reproduced here to permit this Court to understand the nature of the suit that the *amicus* intends to file and the importance of being able to rely on both federal and state law.)

NOTICE OF INTENTION TO SUE

To: Ms. Carol Browner, Administrator
Environmental Protection Agency
401 M. St. S.W.
Washington, D.C. 20460

And: Hon. Janet Reno
Attorney General of the United States
Department of Justice
Kent St. and Constitution Ave. N.W.
Washington, D.C. 20539

And: Michigan Department of Environmental Quality
Stevens T. Mason Bldg.
P.O. Box 30028
Lansing, Michigan 48909

And: Mr. Valdas V. Adamkus
Regional Administrator
U.S. Environmental Protection Agency
77 W. Jackson Blvd., (R-19J)
Chicago, Illinois 60604

This Notice is given pursuant to 40 CFR 135.1 et seq. and specifically 40 CFR 135.3(b) alleging a failure to act with respect to a non-discretionary duty imposed by the Federal Water Pollution Prevention and Control Act, commonly referred to as the Clean Water Act, 33 USC 1251 *et seq*. The purpose of this notice is to advise the Administrator of the Environmental Protection Agency and the Director of the Michigan Department of Environmental Quality (formerly known as the Michigan Department of Natural Resourses) that the plaintiff in a proposed lawsuit, described below, intends to file a civil action under section 505(a)(2), being 33 USC 1365(a)(2) to compel these agencies to enforce effluent standards by bringing either a compliance order or a civil action against the owners and operators

of a combined sewer overflow facility located in Madison Heights, Michigan which regularly discharges wastewater into the Red Run Drain, the Clinton River, and Lake St. Clair, all waters of the United States located in or abutting Macomb County, Michigan.

Pursuant to 40 CFR 135.1 *et seq.* the following information is provided.

1. The plaintiff and the person giving this notice is Carl J. Marlinga, Prosecuting Attorney of Macomb County, (acting upon his relation to the people of Macomb County) Macomb County Court Building, 40 North Main Street, Mt. Clemens, Michigan 48043 (Telephone 810-469-5641). An additional or alternative party plaintiff may be the County of Macomb, 10 North Main Street, Mt. Clemens, Michigan 48043. The attorney of record will be Carl J. Marlinga, Prosecuting Attorney at the address indicated above.

2. The Administrator of the Environmental Protection Agency has a non-discretionary duty under the Clean Water Act and especially under 33 USC 1319 (a)(2) to either issue a compliance order or commence a civil action to enforce permit conditions or limitations whenever the administrator finds, on the basis of information available to him or her, that violations are so widespread that they appear to result from a failure of the state to effectively enforce such permit conditions or limitations.

3. Oakland County is a political subdivision of Michigan located directly to the west of Macomb County. Its waters are located upstream from the waters of Macomb County. The Oakland County Drain Commission is the holder of an NPDES permit for a combined sewer overflow system (CSO) known as the Southeastern Oakland County Sewage Disposal System, and commonly referred to as the Twelve Towns Retention Basin.

The Twelve Towns CSO discharges combined rain water runoff and sewer water into the Red Run Drain, at the border of Macomb and Oakland Counties. The plaintiff in the proposed lawsuit will allege the following.

(a) The Twelve Towns CSO is undersized for the amount of water it must retain, resulting in a continuous pattern of overflow events which will not be abated without additional construction to increase its capacity. Attached to this notice are exhibits 1, 2, and 3 which summarize the overflow events which have occurred in recent history. Exhibit 1 shows the overflows that have occurred from 1987 through October 6th of this year. [The volume of overflows is in millions of gallons.] Exhibit 2 shows the greater detail of the individual overflow events in 1995. Exhibit 3 shows the same detail for 1994. These exhibits are taken from data compiled by the Oakland County Drain Commission, the NPDES permit holder for the Twelve Towns CSO.

(b) The method of dispensing chlorine into the retained waters is haphazard and ineffective in eliminating dangerous toxins and pathogens.

(c) Each year the Twelve Towns CSO discharges waters in violation of its NPDES permit, releasing dangerous toxins and pathogens into the waters of the United States, thereby endangering the health and safety of persons coming into contact with these waters.

(d) The Twelve Towns CSO constitutes a public health hazard and is a continuing source of pollution for the waters of the United States and a nuisance to the citizens of Macomb County.

(e) Neither the Environmental Protection Agency nor the Michigan Department of Environmental Quality have set appropriate or adequate standards to regulate the discharge of non-pathogenic biochemicals and nutrients. Although such substances are not dangerous to living things, the discharge of such substances has caused an overgrowth of plant life in and on the waters. This has led to an overwhelming sight and smell pollution problem destroying any opportunity to use these waters for recreational purposes.

(f) Neither the Environmental Protection Agency nor the Michigan Department of Environmental Quality engage in sufficient testing of the effluent from the Twelve Towns CSO to determine if discharges are within appropriate safety levels.

(g) The United States Environmental Protection Agency and the Michigan Department of Environmental Quality have taken no enforcement action to abate this source of pollution and bring Twelve Towns into full compliance with its NPDES permit.

4. In the proposed lawsuit, the plaintiff will seek injunctive relief to require the Environmental Protection Agency and the Michigan Department of Environmental Quality to either issue a compliance order or commence civil action under 33 USC 1319(a)(2). The plaintiff will also ask the court to determine if the effluent standards are sufficient to protect the public as required by the Clean Water Act.

5. The plaintiff will also rely on Michigan law (specifically MCLA 691.1201) under the doctrines of pendent or ancillary jurisdiction to allow the court to determine the validity, applicability and reasonableness of the water quality standards to be enforced and, further, to order compliance with such standards as the court may approve.

Respectfully submitted,

Carl J. Marlinga (P17102)
Prosecuting Attorney of Macomb County
40 North Main Street, 6th Floor
Mt. Clemens, Michigan 48043
Telephone: (810) 469-5641

Dated: December 4, 1995

cc: Hon. George W. Kuhn
Oakland County Drain Commissioner
#1 Public Works Drive
Waterford, Michigan 48328

EXHIBIT 1

HISTORICAL OVERFLOW DATA

YEAR	NO. OF OVERFLOWS	VOLUME OF OVERFLOWS	ANNUAL RAINFALL
1995 (10/6)	9	765.7	
1994	12	1,119	33.08
1993	11	862	34.02
1992	15	1,033	37.53
1991	7	692	29.30
1990	17	3,141	40.71
1989	11	1,028	32.79
1988	7	378	26.18
1987	14	1,119	34.91

EXHIBIT 2

OAKLAND COUNTY DRAIN COMMISSIONER
INFORMATIONAL MEETING
SOCSDS RTF NPDES PERMIT

October 12, 1995

1995 OVERFLOW SUMMARY

DATE	VOLUME OF OVERFLOW (MG)	RAINFALL (IN)
1. January 20-21	4.4	1.2
2. March 7	80	1.05
3. June 2-3	2.3	0.5*
4. July 16-17	288	1.4
5. July 23	6.5	1.0
6. August 3-4	281	2.6
7. August 5	2.5	0.15
8. August 17	43	1.4
9. October 5-6	58	1.6

***Fecal Coliform Violations**

18

EXHIBIT 3

OAKLAND COUNTY DRAIN COMMISSIONER
INFORMATIONAL MEETING
SOCSDS RTF NPDES PERMIT

October 12, 1995

1994 OVERFLOW SUMMARY

DATE	VOLUME OF OVERFLOW (MG)	RAINFALL (IN)
1. January 28	160	1.5
2. March 21	152	1.15
3. April 30-May 1	7	0.9
4. June 13	500	2.75
5. June 24	124	2.25
6. June 26	23	1.0
7. August 13-14	53	1.9*
8. August 28	43	1.5*
9. October 1	44	1.25*
10. November 6	0.4	.95*
11. November 28	1.4	1.05
12. December 16-17	11	0.65

***Fecal Coliform Violations**